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Uṣūl al-Fiqh is regarded as one of the most important subjects in the study of Islam. This is not only because of its dealing with law, the core and kernel of Islam, but also because its help in studying the development of religious thinking among the Muslims.

This book, namely *Kitāb al-Luma' fī Uṣul al-Fiqh*, is among the earliest works in *Uṣul al-Fiqh* of the Shafi'ite school as well as the overall field of *Uṣūl al-Fiqh*. The author himself is considered among the notable jurists of the Shafi'ite school. The book is read as an introductory text in *Uṣul al-Fiqh* and is still being used as part of the curriculum for *Uṣul al-Fiqh* in many traditional institutions in the Muslim world including the Malay world.

This book is one of the important works which adopted the theoretical approach, known as the approach of the theologians (*Tariqat al-Mutakallimūn*), or the Shāfi'ite principles (*Uṣūl al-Shāfi'iyyah*). This approach focuses on analyzing the issues or topics in *fiqh*, establishing the standard rules (*al-qawā'id*) and supports them with arguments. This approach inclines towards reasoning and rational argumentation and it separates topics related to the principles of jurisprudence (*al-uṣuliyyah*) from the individual rulings of sacred law (*al-furū' al-fiqhiyyah*).

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THE REFULGENCE OF THE PRINCIPLES OF ISLAMIC JURISPRUDENCE

AL-SHĪRĀZĪ

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THE REFULGENCE OF THE PRINCIPLES OF ISLAMIC JURISPRUDENCE

al-Luma' fī Uṣūl al-Fiqh

By

Abū Isḥāq Ibrāhīm ibn ʿAlī
AL-SHĪRĀZĪ
(393-476 A.H.)

Translated, annotated and introduced by
WAN SUHAIMI WAN ABDULLAH
SYAMSUDDIN ARIF

Published in collaboration with

Bank Muamalat

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This humble effort is dedicated to our *mu'addib*
TAN SRI PROFESSOR
DR SYED MUHAMMAD NAQUIB AL-ATTAS
who taught us true appreciation of our intellectual heritage

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FOREWORD

Staring at a human face or a work of art, the beauty lies in the eyes of the beholder. Scanning and fathoming the breadth and depth of a body of knowledge, the lining and inner beauty lies in the heart of hearts. But knowledge exhibits not just beauty, it radiates energy; a word coming close to that description is thought to be 'refulgence'.

Refulgence the word is not readily found in any dictionary. It comes from Latin '*fulgere*' or '*refulgere*' meaning to shine brightly or in radiant state.

The Refulgence of of the Principles of Islamic jurisprudence is like that of the radiant stars, exhibiting shining beauty as well as providing guide to travelers and seafarers. The choice of this book for translation is therefore most appropriate.

This book is among the earliest works in *Uṣūl al-Fiqh* of the Shafi'ite school as well as the overall field of *Uṣūl al-Fiqh*. The author himself is considered among the notable jurists of the Shafi'ite school. The book is read as an introductory text in *Uṣūl al-Fiqh* and is still being used as part of the curriculum for *Uṣūl al-Fiqh* in many traditional institutions in the Muslim world including the Malay world.

IBFIM is indebted to the joint sponsors namely Bank Muamalat Malaysia Berhad and Cagamas Berhad for the kind deeds in putting aside some allocations for the translation of the original work from Arabic to English. Preservation and dissemination of knowledge is indeed a noble corporate social responsibility initiative.

IBFIM is also grateful to the translators, Dr. Wan Suhaimi Wan Abdullah and Dr. Syamsuddin Arif for the patience and painstaking effort in doing justice to the original work.

On behalf of IBFIM's Management, I must also thank En. Mohd. Zain Abd. Rahman, our Head of Knowledge Management Centre, for his eagle vision in selecting the original work for translation, for identifying the correct translator and for seeing the entire publication process through. May Allah the Almighty bless us all.

Dato' Dr. Adnan Alias
Chief Executive Officer
IBFIM

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A very warmest gratitude to the Center for Advanced Studies on Islam, Science and Civilization (CASIS), especially its director, Professor Dr. Muhammad Zainiy Uthman and its former founder-director Professor Dr. Wan Mohd Nor Wan Daud for the peaceful intellectual environment we experienced since joining CASIS that has enable us to finally complete this small effort.

Wan Suhaimi Wan Abdullah
Syamsuddin Arif

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Dr. Wan Suhaimi started his teaching career as a tutor in 1994 at Faculty of Usuluddin, University of Malaya (UM), Kuala Lumpur and extended his service in UM to become a Lecturer at the Department of 'Aqidah and Islamic Thought, Academy of Islamic Studies in 1998, a Senior Lecturer in 2005 and an Associate Professor in 2007. Among the subjects that he taught for under-graduate and post-graduate courses are Islamic Thought, Islamic Philosophy, Kalam, Sufism, Arabic and Malay Manuscript Studies. During his service in UM, he initiated the publication of *Journal of Aqidah and Islamic Thought (AFKAR)* and was the Founder and General Editor of *Aqidah and Islamic Thought Series*.

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DR. SYAMSUDDIN ARIF is currently an Executive Director at Institute for the Study of Islamic Thought and Civilization (INSIST), Jakarta, Indonesia. Previous, he served as Associate Professor at the Center for Advanced Studies on Islam, Science and Civilisation (CASIS), Universiti Teknologi Malaysia, specializing in Islamic philosophy and theology. His research interests include Ibn Sīnā (Avicenna), Ibn 'Arabī, and Sayf al-Dīn al-Āmidī with special focus on logic, epistemology and metaphysics. Prior to joining CASIS in 2012, he was an assistant professor at the International Islamic University Malaysia (IIUM) from 2007 to 2012.

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Although Dr. Syamsuddin pays his focus on Islamic philosophy and theology, he is at home with Western philosophical tradition and Islamic studies in general. He enjoys teaching Arabic and other courses at graduate level that involve reading primary texts.

TRANSLATORS' INTRODUCTION

Abū Isḥāq al-Shīrāzī[1]

He is Ibrāhīm b. 'Alī b. Yūsuf Jamāl al-Dīn Abū Isḥāq al-Fīrūzabadī al-Shīrāzī, born in Fīrūzabad in 393H. where he grew up and learned from Abī 'Abd Allāh Muḥammad b. 'Umar al-Shīrāzī. In 410H., he went to Shīrāz and learned under the instruction of the Shafi'ite scholars Muḥammad b. 'Abd Allāh al-Bayḍāwī (d. 424H.) and Ibn Rāmayn (d. 430H.). Then, he travel to Baṣrah, and later to Baghdād; arriving there in 410H. There he met Abū Ṭayyib al-Ṭabarī whom he accompanied and learned from for more than 10 years. At the age of 37, he mastered many sciences, including *fiqh*, *uṣūl al-fiqh* and the science of debate (*al-jadal wal-munāzarah*).

Among his teachers were Abū Ḥātim al-Ṭabarī (d. 414H.), Abū 'Abd Allāh al-Bayḍāwī (d.424H.), Abū Bakr al-Burqānī (d.425H.), Abū 'Alī Shādhān (d.425H.), Abū Aḥmad Rāmayn (d. 430H.), Abū al-Qāsim al-Karkhī (d. 447H.) and Abū Ṭayyib al-Ṭabarī (d.450H.); and among his students are Abū Ḥakīm al-Khabarī (d.476H.), Abū al-'Abbās al-Jurjānī (d.482H.), Abū Manṣūr al-Shīrāzī (d.493H.) and Abū Muḥammad al-Ṭarā'iqī (d.493H.).

Abū Isḥāq al-Shīrāzī wrote many important works. Among others are *Kitāb al-Muhadhdhab* and *al-Tanbīh* in *fiqh*, *Kitāb al-Tabṣirah*, *Kitāb al-Luma'* and *Sharḥ al-Luma'* in *uṣūl al-fiqh*, and *al-Mulakhkhaṣ* and *al-Ma'ūnah fi al-Jadal* in the field of debate.

He died in 476H.

Kitāb al-Luma' fi Uṣūl al-Fiqh

Since the writing of *Kitāb al-Risālah* by Imam al-Shāfi'ī, which is considered as the first work on the principles of Islamic

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[1] This brief introduction on Abū Isḥāq al-Shīrāzī is based on selected information from the introduction prepared by Muḥy al-Dīn Dīb Mistū and Yūsuf 'Alī Bidīwīy, the editors of Abū Isḥāq Ibrāhīm al-Shīrāzī, *al-Luma' fi Uṣūl al-Fiqh*, Dimashq-Beirut: Dār al-Kalim al-Ṭayyib and Dār Ibn Kathīr, 1995.

jurisprudence (*uṣūl al-fiqh*) in Islam,[2] many works have been produced in the field which contributed to the development of *uṣūl al-fiqh*.

In general, writings on *uṣūl al-fiqh* could be categorised into two major approaches, namely, the theoretical approach, known as the approach of the theologians (*Ṭarīqat al-Mutakallimūn*), or the Shāfi'ite principles (*Uṣūl al-Shāfi'iyyah*), and the deductive approach, known as the approach of the jurists (*Ṭarīqat al-Fuqahā'*), or the Ḥanafite principles (*Uṣūl al-Ḥanafiyyah*).

The former approach focuses on analyzing the issues or topics in *fiqh*, establishing the standard rules (*al-qawā'id*) and supports them with arguments. This approach inclines towards reasoning and rational argumentation and it separates topics related to the principles of jurisprudence (*al-uṣūliyyah*) from the individual rulings of sacred law (*al-furū' al-fiqhiyyah*). While, the latter approach focuses on establishing the standard rules (*al-qawā'id*) and principles based on individual rulings of sacred law narrated from the great jurists. Whenever they found a standard principle contrasting with an established ruling of the school (*al-madhhab*) they will work on either conforming it with the principle or exempting the ruling from that standard principle. In sum, as stated by Kamali, 'the theoretical approach tends to envisage *uṣūl al-fiqh* as an independent discipline to which the *fiqh* must conform, whereas the deductive approach attempts to relate the *uṣūl al-fiqh* more closely to the detailed issues of the *furū' al-fiqh*'.[3]

This book, namely *Kitāb al-Luma' fi Uṣūl al-Fiqh* is one of the important works which adopted the approach of the theologian. In fact, within the Shāfi'ite school, this is considered among the earliest work. Later, we find *Kitāb al-Burhān* by al-Juwaynī (d. 487H), *Kitāb al-Mustasfā* by al-Ghazālī (d. 505H), *Kitāb al-Maḥsūl* by Fakhr al-Dīn al-Rāzī (d. 606H) and *Kitāb al-Iḥkām fi Uṣūl al-Aḥkām* by Sayf al-Dīn al-Āmidī (d. 631H).[4]

Kitāb al-Luma' fi Uṣūl al-Fiqh is known as a clear and comprehensive work in *uṣūl al-fiqh*. It represents the final opinion of al-Shīrāzī in the field, and among the commentaries of the book are the commentary by Muḥammad Yāsīn al-Fādānī, Diyā' al-Dīn al-Kurdī, Mas'ūd al-Yamanī, Abū Muḥammad al-Baghdādī and by Abū Isḥāq al-Shīrāzī himself.

[2] See on the contribution and place of al-Shafi'ī in the development of *usul al-fiqh* in Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (Petaling Jaya: Ilmiah Publishers, 1998), 3-5.

[3] *Ibid*, 8.

[4] See on the development of these two approaches in Kamali, *ibid*, 7-9.

Notes on the Translation[5]

This translation is based on several editions of *Kitāb al-Luma'*. The most referred to is the edition of Muḥy al-Dīn Dīb Mistū and the edition of Aymān Ṣāliḥ Sha'bān. Apart from these edition, we also consulted the edition published by al-Haromain Jaya as well as the commentary of the text, *Sharḥ al-Luma'*. The sources of the text consulted for this translation are:

1. Abū Isḥāq Ibrāhīm al-Shīrāzī, *al-Luma' fi Uṣūl al-Fiqh*, ed. Muḥy al-Dīn Dīb Mistū and Yūsuf 'Alī Bidīwīy, 1st Edition, Dimashq-Beirut: Dār al-Kalim al-Ṭayyib and Dār Ibn Kathīr, 1995 – labelled as *Dimashq edition*
2. Abū Isḥāq Ibrāhīm al-Shīrāzī, *al-Luma' fi Uṣūl al-Fiqh*, ed. Aymān Ṣāliḥ Sha'bān, Cairo: Maktabah al-Tawfīqiyyah, n.d. – labelled as *Cairo edition*
3. Abū Isḥāq Ibrāhīm al-Shīrāzī, *al-Luma' fi Uṣūl al-Fiqh*, Singapore-Jeddah-Indonesia: Al-Haromain Jaya, 2001 – labelled as *Indonesian edition*
4. Abū Isḥāq al-Shīrāzī's *Sharḥ al-Luma'* (2 vols.), ed. 'Abd al-Majīd Turkī (Tunis: Dār al-Gharb al-Islāmī, 2008)

This is not a word-for-word translation although in many cases we try to follow as close as we can the original text. Since the purpose of the translation is to transfer the idea and the message of the writer, we tried to express it in the most readable way. Therefore, in several cases, we added words or phrases within squared brackets [ ] in order to make the sentence more understandable to the readers. We also, whenever necessary, summarized some further explanations of the text especially as found in the commentary of Abū Isḥāq himself, namely *Sharḥ al-Luma'*. Since we are referring to several editions of the text, some comparisons have been made and several variant readings were stated in the footnote.

[5] This translation was done in two parts, the first part which is from the beginning of the text until chapter 37 was translated by Wan Suhaimi Wan Abdullah, while the second part starting from chapter 38 until the end of the text was translated by Syamsudin Arif. The whole book was then revised by Masood Sayyid Yusuf.

The translation of the Qur'anic verses in this translation is based on several published English translation of the Qur'ān, especially that by Abdullah Yusuf Ali's *The Meaning of the Holy Qur'an: Text, Translation and Commentary*.[6] While the translation of the Prophetic traditions (*aḥādith*) and poems found in the text are ours. The references for the *aḥādith* stated in this translation are basically based on the references given by Aḥmad Darwīsh, the editor of Muḥammad Yāsīn al-Fādānī commentary, *Bughyat al-Mushtāq fi Sharḥ al-Luma' Abī Isḥāq*.

[6] (Kuala Lumpur: Islamic Book Trust, 2005).

THE REFULGENCE OF THE PRINCIPLES OF ISLAMIC JURISPRUDENCE

(AL-LUMA' FĪ UṢŪL AL-FIQH)

By

Abū Isḥāq Ibrāhīm ibn 'Alī
AL-SHĪRĀZĪ
(393-476 A.H.)

In the Name of Allāh most Gracious most Merciful
May Allāh bless Muḥammad and his family

The great Shaykh and the unique Imām, Abū Isḥāq Ibrāhīm ibn ʿAlī ibn Yūsuf al-Fayrūz-Ābādī al-Shīrāzī—may Allāh purify his spirit and illuminate his grave—said: All praises to Allāh as He deserves it, and His prayers onto Muḥammad—may Allāh honour him and grant him peace, the seal of the Prophets and the leader of the Messengers.

Some of my brothers asked me to compose for them a brief explanation on the principle of Islamic jurisprudence (*uṣūl al-fiqh*) according to the School [of al-Shāfiʿī] as an additional to what I have written in *al-Tabṣirah* on matters of disputation (*al-khilāf*) [in jurisprudence]. Thus, I have accepted to answer his request and to fulfill his need.

I point out in it matters of disputation and all necessary evidences, for perhaps someone who is not aware about what I have written on the disputations might encounter these issues.

So, towards Allāh I desire and from Him I request that He guides me towards what is correct and generously grant the recompense and rewards, for He is the Most Generous, the Grantor.

As the purpose of this book is the principles of jurisprudence (*uṣūl al-fiqh*), then it is necessary to explain what is knowledge (*al-ʿilm*) and [what is] conjecture (*al-ẓann*) and what relates to both, because upon these depend the comprehention of everything related to jurisprudence (*fiqh*). Then, we will deal with reasoning (*al-naẓar*) and the argument (*al-dalīl*) and what relates to both, because through them knowledge and conjecture are realized. Thereafter, with the Will of Allāh, we shall explain jurisprudence and the principle of jurisprudence.

[1]

ON KNOWLEDGE AND CONJECTURE AND WHAT RELATES TO BOTH

We start the discussion with an explanation of definition (*al-ḥadd*) because through it the reality of all that we are going to mention will be known—with the Will of Allāh.

Definition signifies what is intended (*al-maqṣūd*) by that which is defined, and that which is comprehended in such a way that prevents the inclusion of anything which is not part of it and the exclusion from it of anything which is part of it. Among the conditions of definition is that it should be inclusive and exclusive, whereby the defined (*al-maḥdūd*) exists with the existence of the definition and disappears without it.

Section

Knowledge (*al-ʿilm*) is to know the knowable (*al-maʿlūm*) as it is. The Muʿtazilites say that knowledge is to believe in something as it is, with tranquility of the soul. This is incorrect, as it is invalidated by the commoner's belief (*al-ʿāmī*) in the commoner's belief in something, because this notion exists in their belief, but it is not knowledge.[1]

[1] According to al-Shīrāzī, the Muʿtazilite definition of knowledge is incorrect due to three aspects: First, as they said the knowledge is 'to belief', it excludes the knowledge of God as we cannot say that Allāh believes; Second, they said that knowledge is 'to belief of something' and something is an existence (*al-mawjūd*), thus, it excludes a non-existence (*al-maʿdūm*) which is also the subject of knowledge; Third, the definition of Muʿtazilite implies that knowledge simply means to belief in something and to satisfy with the belief, thus, everyone could be categorized as knowledgeable because everyone may has such characteristics including the commoner, but this is absurd because that is not really a knowledge. See Abū Isḥāq al-Shīrāzī, *Sharḥ al-Luma'*, edited by 'Abd al-Mājid Turkī (Tunis: Dār al-Gharb al-

Section

Knowledge is of two categories; the eternal (*al-qadīm*) and the originated (*al-muḥdath*). The eternal [knowledge] is the knowledge of Allāh and it relates to all objects of knowledge (*al-ma'lumāt*). And this is knowledge characterized neither as necessary (*ḍarūrī*) nor acquired (*muktasab*). The originated knowledge is the knowledge of the creatures (*al-khalq*) which is either necessary or acquired.

Necessary knowledge is every knowledge that accompanies the creatures in a manner that they are unable to refute whether by means of skepticism (*shakk*) or doubt (*shubhah*). This includes knowledge acquired through the five senses, namely, the hearing, seeing, smelling, tasting and touching. It also includes knowledge that comes from the successively-transmitted report (*khabar mutawātir*) like the reports about the early nation and remote lands. Also of this kind is the knowledge acquired in the soul regarding the condition of oneself such as feeling healthy, sick, sad and happy, as well as what he knows of others being active, lazy, happy, sad, distressed, shy, embarrassed, frightened, and the like which the person must necessarily know.

Acquired knowledge is knowledge acquired through reasoning (*naẓar*) and argumentation (*istidlāl*) such as knowledge about the origination of the universe, the existence of the Creator, the truthfulness of the Prophets, the duty to pray and its quantity, the duty to pay the *zakāt* and its liable amount (*niṣab*)[2] and other matters that are known through reasoning and argumentation.

Section

The definition of ignorance (*al-jahl*) is to conceive the object of knowledge (*taṣawwur al-ma'lūm*) not as it is.

Conjecture (*al-ẓann*) is to accept the possibility of two things, one of which being clearer than the other. This is like one's belief in a statement narrated by a trustworthy person as true although it is possible that the matter might not be the case; and such as the assumption that the dense cloud will bring the rain although it is possible that it may disperse without pouring any rain; and the belief of the jurist in the correctness of his judgment on disputable issues

although they would think that it might not be the case; and other than that of matters which are not conclusively known.

Section

Doubt (*al-shakk*) is to accept the possibility of two things, none of which is closer to truth, like the doubt about a thin cloud that it may or may not bring down rain, and the doubt of the jurist concerning matters that are not decided, and other matters in which none of the possibilities prevails over the other.[3]

[3] In *Sharḥ*, the definition of ignorance (*al-jahl*) that is to perceive the knowable object not as it is and the definition of intellect (*al-'aql*) that is a kind on necessary knowledge, it is to know that combining two contradicting things or a thing being in two different places in the same time is impossible and that one is less than two. The place of intellect is in the heart (*al-qalb*) and not in the brain as in the verse: *"Verily in this is a Message for any that has a heart"* (*Qāf*, 50:37); and also because intellect is a kind of necessary knowledge and knowledge is in the heart. *Sharḥ al-Luma'*, 1:151-152.

[2]

ON REASONING (*AL-NAẒAR*) AND EVIDENCE (*AL-DALĪL*)

Reasoning is thinking (*al-fikr*) about the state of the object of reasoning (*al-manẓūr fih*) and it is a way of knowing the judgments (*al-aḥkām*) when it exists with its conditions (*shurūṭ*). Some people reject reasoning which is a wrong attitude, because knowledge of rulings is attained with the presence of reasoning. This shows that it is a way leading to it (i.e. knowledge of judgement).

Section

As for its conditions, there are many:

First, the person who does reasoning must be fully equipped, as we shall discuss—with Allāh's Will—in the chapter on the *mufti*.[4] Second, his reasoning should be concerned with argument and not with obscurity (*shubhah*). And third, the conditions of the argument should be met and arranged accordingly by putting what is prior earlier and placing what is later at the end.

Section

The argument (*al-dalīl*) is that which leads towards the conclusion (*al-maṭlūb*) and there is no difference between what is conclusive among the rulings of sacred laws and what is not. Most theologians say that the word argument is used only for that which leads towards knowledge, because that which merely leads towards conjecture (*al-ẓann*) is not called an argument but an indicator (*amārah*). This is not true because the Arabs do not differentiate in their nomination between what leads to knowledge and what leads to conjecture, therefore, such differentiation is untenable.

As for the one who puts forth the argument (*al-dāll*), it is Allāh the Almighty. It is also said that it (i.e. *al-dāll*) and the argument (*al-*

[4] That is, chapter 74 on the characteristics of *Mufti* and *Mustafti* (*Bab Ṣifāt al-Mufti wal-Mustafti*).

dalil) is one, just like the knower (*al-'ālim*) and the known (*al-'alīm*) are one, although one is actually greater than the other.

And the argument seeker (*al-mustadill*) is the one who seeks the argument (*al-ṭālib lil-dalīl*). I refers to the questioner (*al-sā'il*) because he demands the argument from the person questioned (*al-mas'ūl*), as it refers also to the questioned person because he in turn seeks the argument from the sources (*al-uṣūl*).

Whereas the object of argument (*al-mustadall 'alayh*) is the judgment (*al-ḥukm*), which is permission (*al-taḥlīl*) and prohibition (*al-taḥrīm*).

The evidenced (*al-mustadall lah*) refers to the judgment because the argument is sought for it, as it is similarly applied to the questioner, as the argument is sought for him. The argumentation (*al-istidlāl*) is to seek the argument. And this might be by the questioner to the questioned person and also by the person questioned from the sources.

[3]

ON ISLAMIC JURISPRUDENCE (*AL-FIQH*) AND ITS PRINCIPLES (*UṢUL AL-FIQH*)

Islamic jurisprudence[5] (*al-fiqh*) is the knowledge of Islamic religious laws (*al-aḥkām al-shar'iyyah*), which were derived by the way of juristic reasoning (*al-ijtihād*).[6]

The Islamic religious laws are the obligatory (*al-wājib*), the recommended (*al-nadb*), the permissible (*al-mubāḥ*), the forbidden (*al-maḥẓūr*), the abominable (*al-makrūh*), the valid (*al-ṣaḥīḥ*), and the void (*al-bāṭil*).

The obligatory is that which entails punishment when it is abandoned like [performing] the five daily prayers, [paying] the obligatory charities (*al-zakawāt*), returning the entrusted deposit (*al-waḍā'i'*), [returning] the illegally seized property (*al-maghṣūb*)[7] and others.

The recommended is that which entails rewards when it is practiced but not necessitate punishment when it is neglected; like [performing] the voluntary prayers (*ṣalawāt al-nafl*) and voluntary charities (*ṣadaqāt al-taṭawwu'*) and other non-obligatory practices (*al-mustaḥabbah*).

The permissible is that which entails neither rewards when it is practiced nor punishment when it is neglected; like eating good food, wearing soft dress, sleeping, walking and other permissible actions.

The forbidden is that which necessitates punishment when it is committed; like adultery, sodomy, illegal seizure, stealing and others sinful deeds (*al-ma'āṣī*).

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5 *Fiqh* literally means something subtle (*daqqa*) and obscure (*ghamada*). Someone is called *faqīh* on something when he is capable of contemplating it. The poets in pre-Islamic era are called *faqīh* because they can comprehend the obscure meaning of their poetry and because of the subtle wisdoms they talked which the others may not easily understand. See *Sharḥ al-Luma'*, 1:157.

6 *Ijtihād* according to the jurists is to void the vastness of the text, its meaning and context and to struggle in arriving at the religious law. See detail about *ijtihād* in chapter 75 of this book.

7 This is the right reading as in Haramayn edition, p. 3 and *Sharḥ al-Luma'*, 1: 160 and not *al-ghuṣūb* as in *Cairo edition*.

The abominable is that which is more preferable to avoid than to commit; like performing the prayer while holding oneself from urinating or excreting or whilst looking around, and like performing the prayer at the resting place of camels, or performing it while covering the whole body with clothing, and other non-prohibitive offensive acts[8] (*makrūh tanzīhī*).

The valid is that with which the action is completed and the aim accomplished, like the rewarded prayers and the accomplished sale.

The void is that with which the action is incomplete and the aim is not accomplished; like performing the prayer without ablution, and like selling what does not belong to oneself, and other corrupted things which are not accepted.

Section

The principles of Islamic jurisprudence are the arguments upon which the rulings of the sacred law are built and that with which the arguments are comprehensively acquired.[9]

The arguments here refer to the speech of Allāh the Almighty, as well as to the speech, the actions and the approval (*iqrār*) of the Prophet—may Allāh honour him and grant him peace—, the consensus (*ijmā'*) of the Muslim community, the analogical deduction (*qiyās*), and maintaining the original law in the absence of these arguments, and the formal legal opinion (*fatwā*) of the learned for the commoner.

That with which the arguments are acquired, it is the discussion on elaborating these arguments, its aspects and interelationship. First, it starts with the speech of Allāh the Almighty, and the speech of the Prophet—may Allāh honour him and grant him peace—because these are the basis for the rest of the arguments. This will include various categories of language; the real and the metaphorical (*al-ḥaqīqah wal-majāz*), the command and the prohibition (*al-amr wal-nahy*), the general and the specific (*al-'umūm wal-khuṣūṣ*), the obscure and the evident (*al-mujmal wal-mubayyan*), the abrogating and the abrogated (*al-nāsikh wal-mansūkh*). Then comes the discussion on the actions and the approval of the Prophet—may Allāh honour him and

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8 As opposed to the prohibitive offensive act (*al-makrūh al-taḥrīmī*).

9 As jurisprudence (*fiqh*) is the religious laws and as these laws must be established based on arguments, then the principles of Islamic jurisprudence (*uṣūl al-fiqh*) refers to that arguments and to that with which they arrive at that arguments. *Sharḥ al-Luma'*, 1:161.

grant him peace—since they both function in the same manner as his sayings, in clarifying [the meanings of the *Qur'ān*].

Then, comes the discussion on reports (*al-akhbār*) as it is a way of knowing the sayings and the practices of the Prophet—may Allāh honour him and grant him peace—that we mentioned above. This is followed by the discussion on consensus (*al-ijmāʿ*) for it is established on the basis of and supported by the speech of Allāh the Almighty and the Prophet—may Allāh honour him and grant him peace—as valid argument. Next, comes the discussion on analogical deduction (*al-qiyās*) for it is established as valid argument based on previously mentioned arguments, to which it is ascribed. Then, we mention the original ruling of things because the jurist (*al-mujtahid*) would base their judgments on this when none of those arguments is available, and we shall also discuss the *fatwā* of scholars, the character of the jurisconsult (*al-muftī*) and those who seek for *fatwā* (*al-mustaftī*), as this becomes a way towards the [legal] judgment after acquiring the knowledge of what we have mentioned. Lastly, we shall discuss the juristic reasoning (*al-ijtihād*) and everything related to it, with Allāh's Will.

[4]

THE DIVISIONS OF SPEECH (*AL-KALĀM*)

Everything that is uttered of speech is of two categories: the meaning-less (*muhmal*) and the employed (*mustaʿmal*).[10] The meaning-less speech is that which is composed not for any meaning while employed speech is that which is composed for certain meaning. And it is of two kinds:

First, that which is composed but it carries no meaning like the agnomens (*al-alqāb*), such as Zayd, 'Amr and the like.

And second, that which is composed and it carries meaning, not only in itself but also in other than itself. This comprises of—as divided by the grammarians—three things; nouns (*ism*), verbs (*fiʿl*) and particles (*ḥarf*).

A noun is any word that indicates a meaning in itself without any relation to a specific time like 'man', 'horse', 'donkey', etc.

A verb is any word that indicates a meaning in itself in relation to a time, like your saying: to beat – he beats (*ḍaraba - yaḍribu*); to stand – he stands (*qāma - yaqūmu*), etc.

A particle is that which does not indicate a meaning in itself but indicates a meaning in other than itself, such as 'from' (*min*), to (*ilā*), from (*ʿan*), on (*ʿalā*), etc.

The minimum meaningful speech (*kalām mufīd*) is composed of two nouns, as when you say: Zayd is the one standing (*Zayd qāʾim*) and 'Amr is your brother (*ʿAmr akhūka*); or it is composed of a noun and a verb, e.g.: Zayd went out (*kharaja zayd*), 'Amr stands up (*yaqūmu ʿAmr*). When it is composed of two verbs, or two particles, or a particle and a noun, or a particle and a verb, it does not give any meaning unless it is referring to any of what we have mentioned above, e.g.: "O Zayd" which means: "I call Zayd".[11]

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[10] This division refers to what is conventional among the Arabs. A language is considered neglected when it is not known among the Arabs and not used by them whereas the meaningful one is referring to that which is known and used by the Arabs. *Sharḥ al-Lumaʿ*, 1:167.

[11] *Taqdīr al-Kalām* is aproximating the implications of pronounced or written speech.

[5]

THE REAL (*AL-ḤAQĪQAT*) AND THE FIGURATIVE (*AL-MAJĀZ*)

Meaningful speech (*kalām mufīd*) is divided into real (*ḥaqīqah*) and figurative (*majāz*). Both are used in language. And the *Qur'ān* was revealed containing both.

Some people deny figurative language; Ibn Dāwūd says: There is no figurative speech in the *Qur'ān*, this is incorrect, as Allāh says: *"...there a wall that is willing to fall down..."* (*al-Kahf*, 18:77), whereas we know for sure that a wall (*al-jidār*) has no will. Allāh also says: *"Ask the town..."* (*Yūsuf*, 12:82), whereas we know that a town (*al-qaryah*) cannot communicate. All this indicates that they are allegories.

As for the real (*al-ḥaqīqah*), it is the original state of language. It is defined as every word which is used as it was originally intended without any semantic change (*naql*). It is also defined as words used in accordance with their original communicative significations.

Sometimes, there are allegorical meanings for the real word, like the word sea (*al-baḥr*); in its real meaning it refers to a huge amount of water in one place, whereas in its allegorical meaning, it refers to a race horse and a knowledgeable man. Whenever the word is stated, it should be understood in its real meaning and should not be understood in its allegorical meaning except with reason occasions.

Sometimes, there is no allegorical meaning at all—and this is in most of language—so it should be understood in its real meaning.

As for allegory, it is defined as that which is removed from its real meaning and its usage is less common. This would be by addition and subtraction (*ziyādah wa-nuqṣān*), by rearrangement (*taqdīm wa-ta'khīr*), and by metaphorical use (*isti'ārah*).

An example of addition (*al-ziyādah*) is like in the verse of Qur'ān: *"there is nothing whatever like unto Him"* (*al-Shūrā*, 42:11), and the meaning is: 'There is nothing that resembles Him',[12] the particle '*ka*' is additional.

[12] As Allāh the Almighty is not comparable with any existence, the letter *kāf* which literally means 'like or resemble' in the verse is allegorically an addition because in reality nothing is resemble to Allāh the Almighty, see *Sharḥ al-Luma'*, 1:169.

As for subtraction (*al-nuqṣān*) it is like in the verse of *Qur'ān*: *"Ask the town..."* (*Yūsuf*, 12:82), which refers to 'people of the town', whereby 'the added' (*muḍāf*) is omitted and replaced by 'the added upon' (*muḍāf ilayh*).

An example of rearrangement of words (*al-taqdīm wal-ta'khīr*) is like in the verse of *Qur'ān*: *"And Who brings out the pasturage. And then makes it dark stubble"* (*al-A'lā*, 87:4-5) which means 'the pasturage was brought out dark (*ahwā*), then He makes it dry (*ghuthā'*)',[13] and so the order is reversed.

And the metaphor (*al-isti'ārah*) is like in the verse of *Qur'ān*: *"a wall that is willing to fall down"* (*al-Kahf*, 18:77), where the word 'will' (*irādah*) is used metaphorically,[14] for all allegories have real meanings replaced by other meanings; and we have explained that the allegory is what replaces the original meaning and this original meaning is actually the real meaning.

Section

We can differentiate the allegory (*al-majāz*) from the real (*al-ḥaqīqah*) from various aspects, among others; First, that it is stated clearly as an allegory, as explained by the linguists;[15] Second, that the word be used in a manner such that the linguistic meaning is not what is immediately understood upon hearing it like when the word 'donkey' (*ḥimār*) is used for the idiot and the word 'billy goat' (*tays*) for the fool; Third, to describe something or to name it with something which is impossible to exist, like in the *Qur'ān*: *'Ask the town'*; Fourth, to use word which is neither common nor uniform, as when they use the word 'mountain' (*jabal*) for a heavy man, the word which is not used for the others, or the word 'palm tree' (*nakhlah*) only for a tall person, and not for non-humans; Fifth, that which is not conjugated in its usage like those which are conjugated in its real usage such as the

[13] The verse literally says that God makes the pasturage dry (*ghuthā'*) dark (*ahwā*). *Al-Ahwā* refers to a succulent green plant that becomes darker in colour from its intense green while *al-ghuthā'* mean dry. Thus, there is a kind of forwarding and delaying the expression as the real meaning here would be that the pasturage was made green dark and then it becomes dry. See *Sharḥ al-Luma'*, 1: 169-170.

[14] The word *yurīd* used in the verse literally refers to a will (*irādah*) and it is used metaphorically to refer to the wall as the wall should not have any will.

[15] Like al-Asma'ī, al-Khalīl, Abū 'Amrū and others. In this case, what even words considered by those linguists as real or allegory will be accepted and used accordingly. See *Sharḥ al-Luma'*, 1:173-174.

word *amr* to mean action (*al-fi'l*) where it is not conjugated as the word *al-amr* in the sense of saying (*al-qawl*), that is to conjugate as *amara-ya'muru*.

[6]

THE SOURCES FROM WHICH WORDS AND LANGUAGE DERIVE THEIR MEANINGS

Nouns and languages are derived from four sources; (i) language (*al-lughah*), (ii) custom (*al-'urf*), (iii) sacred law (*al-shar'*), and (iv) analogical reasoning (*al-qiyās*).

As for language, it refers to various vernaculars used by the Arabs and this is of two categories: First, that which gives only one meaning, thus, it is used to indicate the meaning implied by the word, like the word 'man', 'horse', 'dates', 'wheat' and others.

Second, that which gives several meanings and this is also of two categories:

1) That which implies common meanings (*ma'ānī muttafaqah*) like the word *al-lawn* (color) which is used for black, white and all colors, and like the word *al-mushrik* (polytheist) is used for the Jews and the Christians. This word is used to refer to all the meanings it implies, either collectively if the usage of the word implies that, or by referring to any singular meaning substitutably (*al-badal*), when it does not imply the collective meaning; except in the case when there is an indicator denoting the specific meaning of it, then it is used to refer to that particular meaning.

2) That which implies different meanings, like the word *al-bayḍah* which is used to refer to a helmet (*al-khūdhah*), the chicken egg and the ostrich egg. And the word *al-qur'* that can mean menstruation (*al-ḥayḍ*) or purity from it (*al-ṭuhr*). Should there be an indicator specifying any of these meanings, then, it should be understood as referring to that particular meaning. However if there is an indicator but does not specifically indicate any of the two meanings then it should not be understood as any of the meanings, unless with certain indication, as none of these two meanings is more appropriate than the other. But, if there is no indicator indicating any of the two meanings, then, it can be used to refer to both meanings. The Ḥanafite scholars and some Mu'tazilites say: It is not permissible to use a word to refer to two

different meanings. However, the argument for this permissible usage is that there is no contradiction between the two meanings and the word does carry both meanings. Therefore, it should be used for both meanings as we have said in the previous section.[16]

Section

As for custom (*al-ʿurf*), it is when the conventional usage of a word prevails over its linguistic meaning, such that whenever the word is used the conventional meaning is primarily understood, rather than its linguistic meaning. This is like the word *al-dābbah*, which originally refers to all crawling animals, but it is conventionally used to refer to a horse. Also the word *al-ghāʾiṭ* which originally refers to a calm area of the earth but it is conventionally used to refer to human excrements. Thus, the conventional usage becomes its real meaning and so whenever the word is used, the meaning that is established by custom (*al-ʿurf*) is what is understood.[17]

Section

As for the sacred law (*al-shar*ʿ), it is where the linguistic meaning of the word is overwhelmed by the meaning given by the law, such that whenever the word is used, it will not convey except the meaning proposed by the law. This is like the word *al-ṣalāt*, which linguistically refers to a supplication (*al-duʿāʾ*), but then it became conventional in the law as a noun for a specific activity of prayer. Also the word *al-ḥajj* was used to mean the intention (*al-qaṣd*) but then became conventionally used in the law to refer to a set of activities of pilgrimage. Thus, these established meanings by the law has become

16 See detail discussion on this possible usage in *Sharḥ al-Lumaʿ*, 1: 177-179.

17 It is important to note that the custom (*al-ʿurf*) to which the meaning of the word is referred to in this case must belong to that which are there in the time of the Prophet—may Allāh honor him and grant him peace—as well as before his time. Whereas the custom which is newly established after the time of the Prophet, it should not be considered in understanding the words in the *Qurʾān* and the Saying of the Prophet—may Allāh honor him and grant him peace—because the purpose here is to understand the meaning of the *Qurʾān* and the Saying of the Prophet—may Allāh honor him and grant him peace—and we cannot understand that except by referring to what was known in his time or before him and not to what is newly established after his time. See *Sharḥ al-Lumaʿ*, 1: 180-181.

the real meaning of the words, therefore, whenever they are used they convey these established meanings.

Some of our scholars say that there is no word that has undergone semantic change due to the Law. In fact, every word remains in its original meaning in the language. The word *al-ṣalāt* is a noun for supplication (*al-duʿāʾ*), whereas the *al-rukūʿ* (to bow) and *al-sujūd* (to prostrate) are additions to the prayer (*al-ṣalāt*), and they are not of the prayer (*al-ṣalāt*), just as *al-ṭahārah* was added to the *ṣalāt* but not part of it. Similarly, the word *al-ḥajj* is a noun for intention (*al-qaṣd*), whereas *al-ṭawāf* (the circumambulation of the *Kaʿbah*) and *al-saʿy* (run)[18] are additions to the *ḥajj* and they are not part of the *al-ḥajj*. Therefore, whenever the word *al-ṣalāt* is used, it means supplication (*al-duʿāʾ*), and when the word *al-ḥajj* is used, it means intention (*al-qaṣd*). This is the opinion of the Ashʿarites but the former is more accurate because all these words whenever they are used in the sacred law (*al-shar*ʿ) no one understands them as referring to the original meanings which are known in the language. This shows that the words have undergone semantic change due to the sacred law.

Section

Whenever a word is stated and it has both a linguistic and conventional meanings, then it should refer to the established conventional meaning, as this meaning has overcome the linguistic meaning, so that the judgment follows accordingly.

Similarly, whenever a word has both meanings; the linguistic and that of the law, it should be understood according to that which is known in the sacred law because the legal signification rescinds the linguistic one. Also, as the purpose here is to explain judgment of the sacred law, it is more appropriate to understand this according to the meaning (i.e. as given by the sacred law).

Section

As for analogy (*al-qiyās*), it is like naming sodomy (*al-liwāṭ*) as fornication (*zinā*) by analogy to having sexual intercourse with women, and like naming alcohol (*al-nabīdh*) as wine (*khamr*) by

18 That is the ceremony of running seven times between the mounts of Ṣafā and Marwah performed during the pilgrimage (*hajj*).

analogy to grape juice. Our scholars differ on this; some of them, like Abū 'Abbās and Abū 'Alī ibn Abī Hurayrah say that it is permissible to establish the names (*al-asmā'*) and the languages (*al-lughāt*) by analogy, while others say that it is not permissible. The former opinion is more correct because the Arabs name objects which were there in their time with certain names, but later on, they disappeared or the objects perished. Then, people agree to name other similar objects with those names. This shows that they have named objects in analogy to previous objects.

[7]

ON COMMAND (*AL-AMR*), PROHIBITION (*AL-NAHY*) AND EXPLANATION OF COMMAND AND ITS WORDINGS

Know that a command is 'a statement (*qawl*) by which a person asks another of a lower standing person to do something', and some of our scholars add to this definition: 'by way of obligation' (*'alā sabīl al-wujūb*). As for actions, which are not statements (*qawl*),[19] they may be called 'commands' (*amr*) metaphorically, but some of our scholars maintain otherwise. I have defended this view in my *al-Tabṣirah*, and the former is more correct because if action is called command in a real sense as it is the case with a statement, then, it could be conjugated as in the statement i.e. *amara-ya'muru*, as it is said when it refers to statement.

Section

Similarly, statements which do not imply any request (*istid'ā'*), like threat (*al-tahdīd*), as in the *Qur'ān*: *"Do what ye will"* (*Fuṣṣilat*, 41:40), and demonstrate incapacity (*al-ta'jīz*), as in the *Qur'ān*: *"Say, Bring ye then ten suras forged, like unto it"* (*Hūd*, 11:13), and permission (*al-ibāḥah*) as in the *Qur'ān*: *"But when ye are clear of the sacred precincts and of pilgrim garb, ye may hunt"* (*al-Mā'idah*, 5:2), all these are not command.

Al-Balkhī[20] of the Mu'tazilites said: "Permission (*al-ibāḥah*) is a command", but this is not true because permission is actually

[19] That is the word *amr* which is not referred to the said command as in the verse: *"Within three to nine years. To Allāh belongs the command before and after. And that day the believers will rejoice"* (*al-Rūm*, 30:4) and the verse: *"Will they wait until Allāh comes to them in canopies of clouds, with angels (in His train) and the question is (thus) settled? but to Allāh do all questions go back (for decision)"* (*al-Baqarah*, 2:210).

[20] He is 'Abd Allāh ibn Aḥmad b. Maḥmūd al-Ka'bī al-Balkhī al-Khurasānī, one of the great Mu'tazilite scholar who lead a group known as al-Ka'biyyah.

authorization (*al-idhn*) and it is not called a command. Don't you see that when a slave asks for permission from his master to have a rest or take a break from his duty, and his master allows that, it is not said: he 'commanded' him to do that.

Section

Similarly, a statement from someone to the other who is similar [in status], and from someone who is inferior to the superior (i.e. in status); these are not commands, even though the wording (*ṣīghah*) used is of command. This is like when someone prays to God: 'Forgive me and have mercy upon me', this is actually a request and hope.

Section

As for asking for something in the form of recommendation (*al-nadb*), it is not really a command although some of our scholars say that it is a command in a real sense. The argument that it is not a command is the saying of the Prophet—may Allāh honour him and grant him peace: *"If it would not have been a burden on my people I would have commanded them to brush their teeth whenever they are about to perform the prayer"*.[21]

It is known that brushing the teeth (*siwāk*) is recommended (*mandūb*) before every prayer and it is reported that the Prophet did not command it; this indicates that what is recommended is not commanded.

Section

A command has certain wording that requires action such as the verb: "Do! (*if'al*)". However, the Ash'arites[22] say that there is no specific wording for command. The proof that there is a specific wording for

Among his works are *al-Tafsīr*; *Ta'yīd Maqālah Abī al-Hudhayl*; *Qabūl al-Akhbār wa-Ma'rifat al-Rijāl* and *Maqālāt al-Islāmiyyīn*. He died in 319H.

21 Ḥadīth by Abū Hurayrah as narrated by al-Bukhārī in chapter on performing *siwāk* on Friday, *ḥadīth* no. 887 and Muslim in chapter on *siwāk*, ḥadīth no. 252.

22 That is some of the Ash'arite, who claim that there is no specific wording for the command that implies the action, instead they implies both to do and not to do, see *Sharḥ al-Luma'*, 1:199.

command is that the linguists have divided speech (*al-kalām*) into several categories and they said that generally they are command (*'amr*) and prohibition (*nahy*); command is to say: "Do! (*if'al*)", while prohibition is to say: "Don't do! (*lā taf'al*)". Thus, they consider the statement 'Do' alone as a command. This indicates that command has a specific wording.[23]

23 See detail discussion and argumentation on the specific wording of command and that it necessitates the action in *Sharḥ al-Luma'*, 1: 199-205.

[8]

WHAT MAKES COMMAND COMPULSORY (*AL-ĪJĀB*)

Whenever any wording of command is used, it necessitates obligation (*al-wujūb*), according to the majority of our scholars. However, they differ; some of them say that it becomes obligatory by linguistic convention and others say that it becomes obligatory by law. Some of our scholars say that it implies recommendation (*al-nadb*), while some of the Ash'arites say that it implies neither obligation nor anything else except by a proof (*dalīl*). As for the Mu'tazilites, they believe that command implies a will to act (*irādat al-fi'l*); if it comes from the *ḥakīm* (i.e. Allāh the Almighty)[24] it implies recommendation. But if it is from other than Him, then it implies nothing other than the will.[25]

The proof that it implies obligation is the saying of the Prophet—may Allāh honour him and grant him peace: *"If not for fear of oppressing my people I would command them to brush their teeth (siwāk) whenever they are about to perform their prayer"*. This means that if he commanded, then, it would become compulsory and oppressing. Also, because the lord among the Arabs when he says to his slave: 'Give me water', if the slave did not give him, the latter deserved to

[24] See *Sharḥ al-Luma'*, 1:206.

[25] In Cairo and Dimashq editions, the text says: 'it implies none other than not the will' (*lam yaqtaḍin akthar min ghayr al-irādah*) (p. 25) while in the edition of Ḥaramayn (p. 7) and the *Sharḥ al-Luma'* (1:206) it mentions: 'it implies none other than the will' (*lam yaqtaḍin akthar min al-irādah*) (p. 7) without the word *ghayr*. The later reading is more appropriate here. It is important to note that the basis of the Mu'tazilite opinion is their theological principle that the command must be due to the will, that is someone will not command something unless he wills that command to be actualized. So, God will not command something unless due to His Will. They define command as "expressing a will of the action" which implies that the command includes the will. But this is not the case as God would command things that are not of His Will because if it is due to His Will then necessarily the commanded thing will occur accordingly but this is not the case as we read in many verses how God commanded orders for instance on the Satan to bow to Adam a.s. but he refused and did not bow. So, if the orders imply also the will, then, it is impossible for the Satan not to bow because everything that Allāh wills will occur accordingly. See details in *Sharḥ al-Luma'*, 1:193-197, also 1:211-213.

be blamed and scolded. Therefore, if command does not imply obligation, then, he would not deserve any blame.[26]

Section

Whether this wording (i.e. command) is mentioned in the beginning (*ibtidā'*), or it is stated after a restriction (*al-ḥaẓr*), it indeed necessitates obligation (*al-wujūb*). Some scholars of our School say: If it is stated after a restriction, it implies permission (*al-ibāḥah*). The argument that this necessitates obligation is, that every word which necessitates obligation when it is *not* preceded by a restriction also necessitates obligation (*al-ījāb*), when it *is* preceded by a restriction, like one saying: 'I oblige and order' (*awjabtu wa faraḍtu*)[27].

Section

When the argument shows that the command is not meant for obligation, then, it cannot be argued for permissibility (*al-jawāz*); while some scholars of our school say that it can. The former opinion is obvious because command (*al-amr*) is not expressed for permissibility but rather for obligation, while permissibility is implied by way of consequence (*al-tab'*); whenever obligation is void, then, everything that falls within it is also void consequently.

[26] See details in *Sharḥ al-Luma'*, 1:207-210.

[27] This is because it is the word itself that necessitates the obligation, not the circumstances that surround the utterance of the word.

[9]

ON WHETHER COMMAND NECESSITATES ACTION ONCE OR REPEATEDLY (*AL-TIKRĀR*)

When the wording of command (*ṣīghat al-amr*) is stated, necessitating an action, then, it is an obligation to have determination (*al-'azm*) to do action, and it is necessary to repeat that action whenever the command is stated, because when it is stated and there is no determination to do the action, then, the person becomes persistent on obstinacy (*al-'inād*), which is indeed not permissible (*lā yajūz*). As for the action that is commanded, if it implies repetition clearly by the word, then, it has to be repeated. But if it is of a general command (*muṭlaqan*) then there are two opinions on this; some of our scholars[28] are of the opinion that it has to be repeated depending on our ability, while others[29] say that it only necessitates obedience once, except if there is an indicator indicating otherwise. And this is the valid opinion. The argument for this is that the action generally refers to the minimum of what the word implies; have you not observed that if someone swears that he will do something, he is considered to have fulfilled his oath by performing it once, thus, this shows that the general word requires not more than that.

Section

However, when a command is specified by a condition, like if you say: When the sun set then pray, does it necessitate repetition? If we take the opinion which says that any absolute command necessitates repetition, then, the one specified by a condition (*al-mu'allaq bi-sharṭ*) would be the same, but if we take the opinion that any absolute command does not necessitate repetition, then, for the one specified by a condition,[30] there are two positions; some of our scholars say that

28 i.e. Abū Bakr al-Bāqillānī and Abū Ḥātim al-Rāzī, *Sharḥ al-Luma'*, 1: 220.

29 i.e. Abū al-Ṭayyib al-Ṭabarī and Abū Ḥāmid al-Isfarāyīnī. This is also the opinion of Abū Ḥanīfah and the majority of the jurists, *Sharḥ al-Luma'*, 1: 220.

30 In the Cairo edition, the texts says: *fa-fīhi al-mu'allaq bi-sharṭ wajhān* (then in it the conditioned with a condition has two aspects) (p. 26) while in the Ḥaramayn edition, the texts says: *fa-fi al-mu'allaq bi-sharṭ wajhān* (in the conditioned with a condition, it has two aspects) (p. 7). The later reading is more appropriate.

it necessitates repetition whenever the condition recurs, while others say that it does not necessitate [repetition]. The latter is the most valid, because everything which—in its absoluteness—does not necessitate repetition, will not even necessitate repetition when it is specified by a condition. This is like divorce (*al-ṭalāq*) where there is no difference between saying: 'You are divorced' (*anti ṭāliq*) or, 'When the sun set you are divorced' (*idhā zālat al-shams fa-anti ṭāliq*).

Section

When a command on a single action is repeated, like when someone says: Perform the Prayer, then he says: Perform the Prayer; [in this case] if we take the opinion that an absolute command necessitates repetition, then, repeating the command would imply confirmation (*al-ta'kīd*), whereas if we take the opinion that it only necessitates the action once, then, there are two positions on the repetition [of the command]:

First: It is a confirmation (*al-ta'kīd*), and this is according to al-Ṣayrafī.[31]

Second: It is recommencement (*al-isti'nāf*), and this is the correct opinion, and the argument for this is that each one of these two commands necessitates the performance of the action, and then, when both are combined, they necessitate repetition, as if they were two different actions.

31 He is Muḥammad b. 'Abd Allāh al-Ṣayrafī, a theologian and a Shafi'ite jurist of Baghdad. Among his works are *al-Bayān fi Dalā'il al-I'lām 'alā Uṣūl al-Aḥkām* and *al-Farā'id*. He died in 330H.

[10]

ON WHETHER COMMAND NECESSITATES ACTION IMMEDIATELY OR NOT

When there is an absolute command to perform an action, it is necessary to have determination (*al-'azm*) to perform it immediately, as explained in the previous chapter. However, does this also necessitate immediate action with an intention to repeat it?

If we take the opinion that the command necessitates repetition, in accordance with one's ability (*ḥasab al-istiṭā'ah*), then, it necessitates immediate action because that particular situation falls within the ability, and it is not permissible to delay doing it.

If we take the opinion that the command necessitates action once, then, is it necessary to do it immediately or not? In this case, there are two views:

First: That it does not necessitate action immediately[32].

Second: That it necessitates action immediately and this is the view of al-Ṣayrafī and al-Qaḍī Abū Ḥāmid.[33]

The first view is the most appropriate because the [ordering] statement: 'Do' (*if'al*) necessitates performance of the action, without specifying the first or the second period. Thus, when it is done by [performing] the action at the first period, then, it is necessary to continue doing it in the second period.

Section

As for when the command is stated and restricted to a specified time, then, you observe; if the period absorbs the act of worship (*al-'ibādah*) like the fasting in Ramaḍān, then, it is necessary for one to perform the act immediately once the time comes. But, if the specified time is

[32] This is the view of Abū Hāmid al-Isfarāyīnī and Abū al-Ṭayyib al-Ṭabarī, *Sharḥ al-Luma'*, 1: 235.

[33] This is also the opinion of the majority of scholars of Hanafīte school, *Sharḥ al-Luma'*, 1:234. Abū Ḥāmid is Aḥmad b. Bishr ibn 'Āmir, Abū Ḥāmid al-'Āmirī al-Marwā al-Rūdhī, a Shafi'ite jurist from Baṣrah. He is the teacher of Abū Ḥayyān al-Tawḥīdī. Among his works are *al-Jāmi'* and *Sharḥ al-Mukhtaṣar al-Muznī*, he died in 362H.

longer than the performance of a particular worship like the prayer of *Ẓuhr* which is between the afternoon and the time where the shadow becomes similar to its object, then, it is an extended obligation (*wujūban muwassa'an*), the beginning of which is the beginning of the specified time.

The scholars then are of different opinions whether it is necessary to have the determination, instead of performing the prayer, at the beginning of the specified time or not? Some of them are of the view that it is not necessary to do so while the others say that it is necessary to have the determination, instead of performing the prayer, at the beginning of the specified time.

Abū al-Ḥasan al-Karkhī[34] says: The obligation (*al-wujūb*) relates to either one of two things; either to the action (*al-fi'l*) or to the restrictedness of time. Most scholars of Abū Ḥanīfah's School say that the obligation relates to the end of time, but they disagree about those who perform the prayer at the beginning of the time. Some of them say that it (i.e. performing the prayer at the beginning of the time) is a supererogatory (*nafl*) and if the end of the time comes, and he is not considered under obligation (*ahl al-wujūb*); then there is no doubt that what he performed was supererogatory. And if he is the person under obligation then the supererogatory he did withdraws the obligation from him at the end of the time.[35]

Some others say that his performance at the beginning of the time is to be observed; if the end of the time comes and he is considered under obligation, we know that what he did was an obligatory performance (*wājiban*), but if he is not considered under obligation, we know that what he did was a supererogatory performance. The argument for what we said is that what necessitates the obligation is the command (*al-amr*) and that involves the beginning of the time as the verse says: *"Establish prayer at the decline of the sun [from its meridian]"* (*al-Isrā'*, 17:78). Thus, it follows that its obligation is at the beginning of the time.

[34] He is Abū al-Ḥasan, 'Ubayd Allāh ibn al-Ḥusayn al-Karkhī, a jurist and the author of *Risālah fi al-Uṣūl allatī 'alayhā Madār Furū' al-Ḥanafiyyah*. He died in 340H.

[35] In *Sharḥ al-Luma'*, 1:246: "Some of them said that it is considered supererogatory except that this supererogatory withdraws the obligation of the duty at the end of the time. Thus, the obligated Muslim will go free of this world when he performed the prayer at the beginning of the time and he will not be obliged with the prayer".

Section

If the specified time for the worship elapsed and he did not perform it, does it require a make-up performance (*al-qaḍā'*) or not? There are two views; some of our scholars say that it is necessary, while some others say that it is not necessary except with a second command and this is the most appropriate because the first command does not include what is beyond the specified time, therefore, it is not necessary to perform it at this time (i.e. beyond the specified time) in the same way it is not obligatory to perform it before the specified time.

Section

When there is a command for a worship in a specific time and the person performs it in that particular time, it is called a performance (*adā'*) in its real sense and is not called a replacement (*qaḍā'*) except metaphorically as in the verse: *"So when ye have accomplished (qaḍaytum) your holy rites"* (*al-Baqarah*, 2:200) and in: *"And when the Prayer is finished (quḍiyat), then may ye disperse through the land"* (*al-Jumu'ah*, 62:10). However, if he was within the time and performed it incorrectly, or he forgot any of its conditions and then he repeated it within the time, then, it is called repetition (*i'ādah*) and performance (*adā'*). But, if the time elapsed and he performs it after the time is over, it is called replacement (*qaḍā'*).

[11]

ON COMMAND IN THE FORM OF CHOICE (*AL-TAKHYĪR*) AND SEQUENCE (*AL-TARTĪB*)

When Allāh the Almighty gives options between things like in the penance of the oath (*kaffārat al-yamīn*) in which Allāh the Almighty allows the options to free (*al-'itq*) the slave or to feed the poor or to clothe them, then, the obligatory here is any one of these, without specification. So, by doing whichever of these options, the person has fulfilled his obligation. If he did all options together, then, the obligation is fulfilled through one of them while the rest is counted as voluntary acts. The Mu'tazilites say that all the three are obligatory. Here, if they think that the obligation of all [those acts in the penance of oath] simply means that each of those choices is equally commanded, then it is correct, and the disagreement is merely on the expression and not on the conception. But if they imply that the obligation of all means that one is commanded to do all together, then the argument for the invalidity of this view is that when someone neglects all of them, he will not be punished for all of them. If the obligation is indeed for all of them, then he will be punished for all of them. Thus, since the punishment is not for all of them but only for one of them, this indicates that the obligation is for any one of them.[36]

[36] As the penance of the oath is to choose any of the three options without any determination, then by fulfilling any one of the choices someone is fulfilling the penance of the oath. This means that the requirement for the penance of the oath is to perform one of the choices and not all choices together. This implies that he will be punished if he did not perform any of the choices. Thus, in the case when someone did not perform all the choices, he is actually will be punished not because he did not perform all the choices but because he did not perform any of the choices, which is the requirement here. Therefore, based on this fact, it is argued that since the punishment is not for neglecting all the three choices, but only for neglecting any of the choices, then it is understood that the obligation to fulfil the penance of the oath here is not to perform all choices together as claimed by the Mu'tazilite, but to choose one of the choices, see *Sharh al-Luma'*, 1:256.

Section

However, if the command on something is in the form of certain order (*al-tartīb*) like in the case of the divorcer (*al-muẓāhir*)[37] in which it is commanded to free a slave if one could find that, or to do the fasting if he cannot find a slave, or to feed the poor if he is incapable to do any of the previous options. Here, the obligatory is one particular option in accordance to one's condition; if it is affordable then he is obligated to free a slave, but if it is difficult, then, the obligation is to do the fasting, and if he is incapable of both, then, he is obligated to feed the poor. If his obligation is to free a slave and he combines between that with other options, his obligation is fulfilled through freeing the slave while the other options he did are considered voluntary. If he combines his obligation of fasting with the others, then his obligation is fulfilled through either freeing the slave or fasting, while feeding the poor will be voluntary. And if he combines his obligation of feeding the poor with other options, the obligation is fulfilled through any one of the three, as in the multiple choices of expiations (*al-kaffārah al-mukhayyarah*).[38]

[37] That is in the *ẓihār*, a pre-Islamic form of divorce which consists in the word of repudiation by saying: 'You are to me like my mother's back'.

[38] Here, if someone combines between the fasting and freeing the slave, then the obligation is fulfilled from freeing the slave as it is prior in order. But if the combination is between the fasting and feeding the poor, then the obligation is fulfilled from the fasting as it is prior in order. However, if the combination is between feeding the poor, as in the condition where he is capable of doing this at that time, and the fasting, or freeing the slave, or both, then the fulfilment here is from any of them as in the case of the penance of the oath. The order is not considered here as he had fulfilled the obligation with the last option he could, according to his condition, at that time, see *Sharh al-Luma'*, 1:258-259.

[12]

THE NECESSITY OF THAT WITHOUT WHICH THE COMMANDED THING WILL NOT BE ACCOMPLISHED

When an action is commanded and the accomplishment of the action depends on another action, then you should observe; if the command is preconditioned by that other thing, like ability (*al-istiṭā'ah*) to perform the pilgrimage and wealth (*al-māl*) to pay the *zakāt*, then, the command to perform the pilgrimage and to pay the *zakāt* is not a command to acquire those conditions, because the command to perform the pilgrimage is not applicable to those who do not have the ability and the command to pay the *zakāt* is not applicable to those who do not have wealth. If we force him to acquire those conditions in order to include them within the command, then we are eliminating the condition of the command and this is not permissible. If the command is absolute without any preconditions, then the command to do the action is a command to do it and to do whatever is necessary for it (*mā lā yatimmu illā bihi*). It is like the ablution (*al-ṭahārah*) for the prayer (*al-ṣalāt*) where the command to perform the prayer is also a command to take an ablution. Or, like washing part of the head in order to fulfill the obligation of washing the face; where the command to do this is a command to wash (*al-ghusl*) the other, as it is commanded due to the obligation of performing prayer and of washing the face. If the command does not include whatever is necessary for it, then we are eliminating the obligation of the commanded (*al-ma'mūr*). Therefore, to those who forgot performing a prayer of the day and night and he does not know which of the prayer he forgot, we say that he is obligated to settle all the five prayers so that the forgotten one will be included.

Section

If the command on a certain act of worship is of a certain character (*ṣifat*) and if it is characterized as compulsory, like coming to rest (*al-ṭuma'nīnah*) while bowing in the prayer (*al-rukū'*), this indicates that the act of bowing (*al-rukū'*) is compulsory because that necessary

character will not become actualized unless by doing the said action. But if it is characterized as voluntary (*nadb*) like chanting the *talbiyah*,[39] then, this does not indicate that the *talbiyah* is obligatory. Some scholars say that it indicates the obligation of the *talbiyah*, but this is wrong because that will turn it into being compulsory and voluntary, whereas there is no indication of obligation in the original act.

Section

When there is a command for a certain thing, it implies prohibition (*nahy*) of its opposite; if the command is obligatory, then, the prohibition of its opposite will be obligatory and if it is voluntary then the prohibition of its opposite will also be voluntary. Some of our scholars said that it does not prohibit its opposite and this is the view of the Mu'tazilites. The proof of what we said is that fulfilling the commanded thing is not accomplished except by neglecting its opposite; it is like the purification (*al-ṭahārah*) in the case of the prayer.

Section

As for the command to avoid a certain thing, if the avoidance of it is not possible except by avoiding other things, then, it is of two situations:

First: If there is difficulty for total avoidance, then the legal forbiddance of it is dropped and [consequently] the obligation of avoidance is also dropped. This is like when an impurity (*najāsah*) fell in a huge amount of water, or when a sister of someone could not be identified among the women of a country, [in this case] it is permissible for him to perform his ablution with the water and [for a man] to get married with any woman from that country.[40]

Second: If there is no difficulty in total avoidance, then there are two possibilities. The first is where the forbidden (*al-muḥarram*) is mixed with the permissible (*al-mubāḥ*), like the impurity found in a little amount of water or the slave girl (*al-jāriyah*) shared by two men,

39 That is when performing the pilgrimage in front of Ka'bah.

40 In this case the man is allowed to marry any women in the country because it is difficult for him to assure that he will not marry his sister, who is among the women of that country, unless he does not get married at all and this is a great difficulty, *Sharḥ al-Luma'*, 1:263.

in this case, it is obligatory to avoid it totally. The second one is where there is no mixing, but we do not know which one is permissible, this has two options; an option is that he may inquire, like the clean water when it somehow looks like impure water, then one should make a scrutiny, and another opinion is that he may not inquire, like when a sister is confused with a foreign woman, and water when it resembles urine, then, he is obligated to avoid it totally.[41]

41 In this case, since the sister could not be identified within only a limited number of women and not the whole women community in the country, then it is not difficult for him to avoid the group in which his sister is, and therefore, to assure that he did not marry his own sister, *Sharḥ al-Luma'*, 1:264.

[13]

COMMAND IMPLIES SUFFICIENCY OF THE COMMANDED ACTION

Know that whenever Allāh the Almighty commands an action, the [realization of the] commanded action (*al-ma'mūr*) is either by performing it precisely in accordance with the command or to do more or less than what is commanded. If it is done precisely in accordance with the command, then it is sufficient to fulfill the command. Some Mu'tazilites claim that fulfilling the command alone does not imply sufficiency, as that [sufficiency] needs to be based on another indicator. This view is inaccurate because the required action has been done in accordance with the command, thus he should be considered as regaining the state he was before the command.[42]

Section

If someone performs more than what is commanded, for instance he is commanded to bow (*rukū'*) in prayer and he performs it more than the minimum of what the name applied to, the obligation is fulfilled by the minimum requirement of the command while the additional action is considered voluntary (*taṭawwu'*) and is not part of the command. Some scholars say that all [of these][43] are considered part of the command, but this is not true as what is additional from the original command can be ignored absolutely and when it is done it is not an obligation, like other voluntary actions (*al-nawāfil*).

Section

However if he performs less than what is commanded, then you observe; if what is left out is required for its validity, like performing the prayer without recitation [of *al-Fātiḥah*], then it is not sufficient and not fulfilling anything of the command because he did not perform the commanded action accordingly. But, if what is left out is

[42] Meaning that once he had fulfilled the command he has no more obligation and he is now back to his previous state before receiving any command.

[43] That is the original command as well as the additional action.

not required [for its validity], like saying "in the Name of Allāh" (*tasmiyah*) in the purification (*al-ṭahārah*), then he is fulfilling the command. But, is it considered part of the general command (*al-amr al-ẓāhir*)? Some of our scholars say that it is not considered part of the command while some of the Ḥanafite scholars say that it is considered so, but this is not true because the abominable (*al-makrūh*)—as the pohibited (*al-muḥarram*)—is forbidden, therefore it cannot be included within the term command.

[14]

WHO IS INCLUDED IN THE COMMAND AND WHO IS NOT?

Know that the absent-minded person (*al-sāhī*) should be included neither within command (*al-amr*) nor prohibition (*al-nahy*) as the very purpose of being closer [to Allāh] by performing [the commanded] and avoiding [the prohibited] presupposes the knowledge of it in order for this purpose to be valid. But this is impossible for the absent-minded (*al-nāsī*). Have you not observed that if it is said to him: 'Do not talk while praying when you are absent-minded', then it is necessary for him to work on avoiding whatever thing he knows he is absent-minded of. But, his awareness that he is absent-minded negates his absent-mindedness.[44] Therefore, it is invalid to address him with the command in this situation.

Section

Similarly, the command should not be addressed to the sleeper, nor to the madman, nor to the drunken because if it is possible for them to be commanded while they are in the state of lost-mindedness (*zawāl al-'aql*), then, it would be also possible to command the animal and the children in their very early childhood, but no one says this.

Section

As for a person under-duress (*al-mukrah*), it is valid for him to be included under the command and religious responsibility (*al-taklīf*). The Mu'tazilites say that they should not be included under responsibility. This is not true because if they are not under legal responsibility they would not be legally obligated not to kill even when under-duress, and since he (i.e. the killer) has knowledge and

[44] In the *Sharḥ al-Luma'*, it explains that if the absent-minded person is included within the command, then, the person will try to perform the obligation and avoid the prohibition while imagining that he is absent-minded—although he is not in the state of absent-minded—in order to fulfil the state of command. But this is absurd. See 1:270.

intention when committing an act of killing, then he is not really a person under-duress (*al-mukrah*).

Section

As for the child (*al-ṣabiy*), they are not included under the expression of obligation (*khiṭāb al-taklīf*) as the law has already established that they are not yet responsible. However, as for rights on his wealth like the payment of the obligatory alms and expenses (*al-zakawāt wal-nafaqāt*), it is permissible to be included within their responsibility and the duty and responsibility to manage this is not on him but on his guardian (*waliy*).

Section

And as for the slave, they are included within the commandments. Some of our scholars said that they are not considered responsible in the law except with an argument, and this is not true because the commandment is valid for them as it is valid for the free man.

Section

The unbeliever (*al-kuffār*) is included in the commandment. Some of our scholars said that they are not responsible in the religious obligations (*al-shar'iyyāt*) and some others have said that they are responsible with regards to the prohibitions (*al-manhiyyāt*) but not to the commandments (*al-ma'mūrāt*). The argument that they are responsible with regards to both is the verse: *"What led you into Hell Fire? They will say: "We were not of those who prayed"* (*al-Muddaththir*, 74:42-43). If they are not commanded to perform the prayer, then Allāh will not punish them for that. Also, the validity of commandents on Muslims is the same as it is on non-Muslims. Thus, if the Muslims are included in the commandments, then, so too, of necessity, are non-Muslims.

Section

As for women, they are not included within the commandment for the man. Abū Bakr ibn Dāwūd and a group of Ḥanafite scholars said that they are included. This is not true because there is a specific expression for women, as there is a specific expression for man.

Therefore, as man is not included in a commandment for women, similarly women are not included in the commandment for men.

Section

As for the Prophet—may Allāh honour him and grant him peace—, he is included in all commandment stated for the nation (*al-ummah*) like when Allāh the Almighty commands: *"O mankind"* (*al-Baqarah*, 2:21) and *"O you who believe..."* (*al-Baqarah*, 2:104) and others. This is because the term is valid for the Prophet—may Allāh honour him and grant him peace—as it is valid for any individual of the nation; therefore as the nation is included so does the Prophet—may Allāh honour him and grant him peace. However, when the commandment is specifically and personally for the Prophet—may Allāh honour him and grant him peace—, like when Allāh the Almighty commands: *"O Prophet..."* (*al-Anfāl*, 8:64), and *"O thou folded in garments! Stand (to prayer) by night..."* (*al-Muzzammil*, 73:1-2), and *"O Prophet, say to your wives..."* (*al-Aḥzāb*, 33:28), then the rest of the nation is excluded except when there is an indicator. Some scholars claim that what was established as lawful for him (the Prophet), then everyone is also included with him, and this is not true because the commandment is specific for him and those who think that the others are also included are actually opposing what is understood from the commandment.

Section

When the Prophet—may Allāh honour him and grant him peace—commands his nation with a command, he is not included in it. Some of our scholars said that he is included in his command for the nation, but this is not true because what was commanded for the nation by him is not valid for him. Therefore it should not include him without any indication.[45]

Section

The command by Allāh the Almighty for the creation with a direct addressing (*khiṭāb al-muwājahah*) like when He says: *"O Mankind..."* (*al-Baqarah*, 2:21) and *"O you who believe..."* (*al-Baqarah*, 2:104), then,

[45] In the *Sharḥ al-Luma'*, this section was presented earlier in order, see 1:269-270.

everything which is not created in the way the word and the term expressed is not included within this command because this commandment is not valid except for those who exists with the characteristics mentioned in the command, while those who do not have such characteristics, then such commandments are not valid for him. Similarly, if the Prophet—may Allāh honour him and grant him peace—addressed someone among his companions in such a manner that the words used were not inclusive of others, others cannot be included in such an address, because the commandment he expressed did not include others. However, others will be included within such addresses because of a separate indication; that is his saying: *"My judgment on a person is my judgment on a group"*;[46] and by analogy, i.e when the meaning upon which he based his judgement on the individual exists in others, the ruling will be applied to others by means of analogy.

Section

When the commandment is expressed in a general term, it will include everyone who is valid for that and none will be exempted from that action, even when some of them had performed it, unless there is a statement by the law stating that it is of a collective duty (*farḍ kifāyah*) like in case of the holy war, wrapping the dead body, performing the prayer for the dead and burying it because in this case when some do it, then the rest are exempted.

[46] *Ḥukmī 'alā al-wāḥid ḥukmī 'alā al-jamā'ah*: This ḥadīth according to the editor of *al-Luma'*, based on several sources like al-Mizzī, al-Dhahabī and al-'Irāqī, was not found. However according to the editor of *Sharḥ al-Luma'*, similar meaning could be read in al-Nasā'ī, al-Tirmidhī, Ibn Ḥibbān and al-Dāraquṭnī which says: Indeed my statement for a hundred of women is my statement for one women (*Innamā qawlī li mi'at imra'atin ka qawlī li imra'atin wāḥidatin*). See *al-Luma'*, Dimashq edition, p. 63 (footnote no. 1) and *Sharḥ al-Luma'*, 1:283 (footnote no. 6).

[15]

ON EXPLAINING THE TERMS *AL-FARḌ*, *AL-WĀJIB*, *AL-SUNNAH* AND *AL-NADB*

The terms *al-wājib* (the obligation), *al-farḍ* (the duty) and *al-maktūb* (the fated) are one and they refer to that which entails punishment when neglected. Some of the scholars of Abū Ḥanīfah said that the term *al-wājib* refers to that which its obligation is established by evidences that are open to juristic reasoning (*al-mujtahad fīh*) like—for them—the *witr* prayer and the ritual animal-sacrifice (*al-uḍḥiyah*), while the term *al-farḍ* refers to that which its obligation is established by definitive evidences (*maqṭū'*), like the five prayers, the compulsory charities and the likes. This is incorrect because the way to [establish] the nouns is [based on] the Islamic law, the language (i.e. Arabic) and its usage, and there is no difference in this basis between what was established by a definitive argument and what was established by the juristic reasoning.

Section

The word *sunnah* refers to that which is delineated to be followed in a recommendable manner (*al-istiḥbāb*). This term together with the term *al-nafl* (the voluntary) and *al-nadb* (the recommendation) are of the same meaning. Some scholars said that *al-sunnah* refers to that which was done systematically and on a regular basis, like the recommended prayers before and after the obligatory prayers, while *al-nafl* and *al-nadb* refer to what is additional to those [i.e. those done not systematically]. This is not correct, for everything the divine law (*al-shar'*) has regulated as recommendable is *sunnah*, whether it is was done systematically or not. Thus, this differentiation is not necessary.

Section

When the Companion says: "The Prophet—may Allāh honour him and grant him peace—commanded so and so...", it is obligatory to accept it, and it becomes as if the Prophet himself said: "I command

so and so...". The follower of Dāwūd[47] said that it is not accepted unless the word of the Prophet is narrated. The argument of what we asserted is that the narrator (the Companion) is trustworthy in what he has narrated and he knows the command and the prohibition because it is his language, therefore it is necessary to accept it, as like everything else he narrated.

Section

However, if he (the companion) says: "Someone commanded such and such..." or "we were commanded such and such..." or "we were prohibited from such and such..." and he did not name the commander, then it refers to the Prophet—may Allāh honour him and grant him peace. Similarly, when it is said that "among the Sunnah is such and such...", it is also refer to the tradition of the Prophet may Allāh honour him and grant him peace. Some followers of Abū Ḥanīfah said that it does not thus refer to, except if there is an indicator of such and this is the opinion of Abū Bakr al-Ṣayrafī. This is not correct because there is no one whose commands, prohibitions, and traditions are considered an authoritative source except the Prophet—may Allāh honour him and grant him peace. Therefore, when the Companions mention, it is compulsory that it refers to the Prophet—may Allāh honour him and grant him peace.

[47] He is Dāwūd ibn 'Alī ibn Khalf al-Asbahānī known as al-Ẓāhirī, one of the great jurists and the founder of al-Ẓāhiriyyah school. He died in 270H.

[16]

ON PROHIBITION (*AL-NAHY*)

Prohibition (*al-nahy*) is similar to command (*al-amr*) in most aspects we mentioned before, except that I will point out here briefly the prohibition and explain how it differs from the command, with Allāh's Will.

As for its reality, it is a statement (*al-qawl*) that requires another person not to do an action, and some of our scholars add 'in an obligatory manner', as we had mentioned in the discussion on the command.

Section

Linguistically, it has a specific wording to indicate it, and that is to say: 'Don't do'. The Asha'rite said that it does not have a specific wording, but the argument on this had been presented before in the discussion on the command.

Section

Whenever it is expressed in an absolute wording, it necessitates forbiddance (*al-taḥrīm*). The Ash'arite said that it necessitates neither the forbiddance nor others except with an evidence. The argument of what we said is that a master among the Arabs when he says to his servant: 'Don't do so and so...' but he does it instead, then, he deserved blame and reproach. Thus, this indicates that it necessitates forbiddance.

Section

When it is expressed in an absolute wording, it necessitates abandonment (*al-tark*) permanently and immediately. This is dissimilar to the command because the command necessitates obligatoriness of an action and when it is done once at any time, the person is obedient. However, in the prohibition, the person will not be considered as compliant to the prohibition unless he immediately and permanently abandons it.

Section

When something is prohibited; if there is only one opposite (*didd*) then it is actually a command for that particular opposite, like fasting on the two annual celebrations (*al-'īdayn*). But if it has multiple opposites like in adultery, then it is a command for any of those multiple opposites because one could not abandon the prohibited thing unless with what we had stated.

Section

When the prohibition is on one of two things, combining the two is prohibited, but doing only one of the two is permissible. The Mu'tazilite said that it implies the prohibition of both and it is not allow to do any of them. The proof of what we said is that the prohibition is a command to abandon as the command is an order to do, and since the command to do any of two things does not necessitate the obligation of both, similarly the command to abandon any of two things does not necessitate the obligatory abandonment of both.

Section

In the opinion of the majority of our scholars, the prohibition indicates that the prohibited thing (*al-manhiy 'anhu*) is invalid (*fasād*) as the command indicates that the ordered thing (*al-ma'mūr bihi*) is valid. However, they disagree; some of them said that it (i.e. the prohibited) necessitates invalidity from the point of view of the language but others said that it necessitates invalidity from the point of view of the law (*al-shar'*). Among our scholars are those who said that the prohibition does not indicate invalidity, and this is understood from what had been reported from al-Shāfi'ī and this is the opinion of a group of followers of Abū Ḥanīfah and most theologians.

Those who assert this opinion however are not in agreement on the differentiation between what is invalid and what is not. Some of them said that if there is, in the prohibited action, a breach of the conditions of its validity—i.e. in the case of worship—or in its effectiveness—i.e. in the case of a contract—then it is necessary to consider it as invalid. But, if there is no such breach, it is not necessary to be considered as invalid. While some others said that if

the prohibition is specifically related to the performance of the prohibited action, like to perform the prayer in an impure place, then it is necessarily considered as invalid, but if it is not specifically related to such prohibited action like to perform the prayer in a stolen house, then it does not necessitate invalidity. The argument that the prohibition necessitates invalidity [of the action] in an absolute sense is that when a worship is commanded absolutely without any prohibition but it is performed in a prohibited way, then he is considered as not performing the command in the way necessitated by the command. Thus, necessarily the commanded worship will remain his obligation as before.

[17]

THE GENERAL (*AL-ʿUMŪM*) AND THE SPECIFIC (*AL-KHUṢŪṢ*)

The Reality of the General and the Explanation of Its Terminologies

The general (*al-ʿumūm*) is all terms that encompass two things and more. It may refer to only two things like you say: 'I include both Zayd and 'Umar (*ʿammamtu Zaydan wa-ʿUmaran*) in the gift'. It can also refer to all genus like you say: 'I include all the people in the gift'. Thus, the minimum it covers is two and the most is whatever included the whole genus.

Section

The general has four categories of terms:

The first: The plural noun when it is specified with the *alif* and *lām* like the words *al-muslimūn*, *al-mushrikūn*, *al-abrār*, *al-fujjār* and the like. As for the words which are not made definite with *alif* and *lām* like *muslimūn*, *mushrikūn*, *abrār* and *fujjār*, they do not necessitate the general. Some of our scholars said that it implies the general, and this is the opinion of Abū 'Alī al-Jubbā'ī.[48] The argument that this is wrong is that it is in an indefinite form (*nakirah*), and therefore, it does not necessitate the genus like the statement: 'Muslim man'.

Section

The second; the generic noun when it is specified with the *alif* and *lām* like the words *al-rajul* and *al-muslim*. Some of our scholars said that they are used to indicate something already mentioned or known (*al-ʿahd*) and not the genus. The argument that it refers to the genus is Allāh's statement: *"By time. Indeed, mankind is in loss..."* (*al-ʿAṣr*,

48 He is Muḥammad ibn 'Abd al-Wahhāb ibn Salām Abū 'Alī al-Jubbā'ī. He is among the great scholars and theologians of the Mu'tazilite in Baṣrah. He is the founder of al-Jubbā'iyyah school. He died in 303H.

103:1-2) where it refers here to the genus because as you can see later a plural word (*al-jam'*) is exempted, Allāh says: *"Except for those who have believed"* (*al-'Aṣr*, 103:3). Also, the Arabs would say when they are referring to the genus: "People are destroyed by the Dinar and the Dirham".

Section

The third; the ambiguous nouns (*al-asmā' al-mubhamah*) like the word *man* (who) for rational beings and the word *mā* (what) for non-rational beings, in inquiry (*al-istifhām*), condition (*al-sharṭ*) and reward (*al-jazā'*). As for in inquiry you say: 'Who is with you?' and 'What do you have?' And in reward you say: 'He who honours me I will honour him' and 'whatever comes to me I will appreciate it'. And the word *ayyu* (which of them) is used in inquiry, condition and reward for both rational and non-rational beings. You say in inquiry: 'Which thing is with you?', and in condition and reward: "Whichever person honours me I will honour him". The other words are *ayna* (where) and *ḥayth* (wherever/however) for place and *matā* (when) for time, you say: 'You can go wherever you want, wherever/however you want and seek me whenever you want'.

Section

The fourth; the denial in non-specified form (*al-nakirah*) like you say: 'I have nothing' and 'There is no man in the house'.

Section

The minimum number for plural is three, so when a plural word is mentioned like: *muslimūn* (Muslims) and *rijāl* (Men), then it should be understood as three persons. Some of our scholars say—and it is also the position of Mālik, Ibn Dāwūd, Niftawayh[49] and some theologians—that it refers to two. The argument of what we said is that Ibn 'Abbās had argued with 'Uthmān—may Allāh be pleased with him—on the issue of two brothers blocking mother from inheritance, where he said: *al-akhawān* (two brothers), it cannot be

[49] He is Ibrāhīm ibn Muḥammad ibn 'Arafat Abū 'Abdullāh al-Azdī, the grammarian. He is also a jurist of Dāwūd al-Ẓāhirī and the expert in *ḥadīth*. In grammar, he follows the school of Sibawayh. He is the author of *Gharīb al-Qur'ān*, *Kitāb al-Wuzarā'*, *Amthāl al-Qur'ān* and others. He died in 323H.

said of them *ikhwah* (brotherhood) in the language of your people. 'Uthmān said: I cannot contradict [a ruling] that was already established, by which people have inherited before, and which has been established in the city-centers of Islamic knowledge.[50] Ibn 'Abbās asserted that *akhawayn* (two brothers) cannot be referred to as *ikhwah*, then 'Uthmān—may Allāh be pleased with him—accepted that, but moved away from its application based on the consensus (*al-ijmā'*). The other argument is because they (the Arab) had differentiated between what the one, the two and the plural where they say: *rajul* (man), *rajulān* (two man) and *rijāl* (men); if two is considered as plural like three, there will be no objections among them on the term.

[50] Narrated by al-Ḥākim (4:335), al-Bayhaqī in his *al-Sunan al-Kubrā* (6:227) and Ibn Jarīr al-Ṭabarī in his *al-Tafsīr* (4:188).

[18]

THE GENERAL WORDING AND WHAT IT ENTAILS

When the generic words—that we mentioned—are in an absolute form, they necessitate generality in meaning and it absorbs the genus and the wording. The Ash'arite said that there is no specific wording for generality and that these terms imply generic and specific meanings. Therefore, when they are said, the meaning is pending on a proof to indicate the intended meaning, be it specific or generic. Other scholars said that, if it is information (*al-akhbār*), it does not imply a generic meaning, but if it is a command (*al-amr*) or prohibition (*al-nahy*), then, it implies a generic meaning. While others is of the opinion that it implies minimal number of the plural and for the extra number it is pending.

The argument for what we said is that the Arabs differentiate between one, two and three, as they say: *rajul* (one man), *rajulān* (two men) and *rijāl* (three and more men), as they also differentiate between individuals (*al-a'yān*) in names when they say: *rajul* (a man), *faras* (a horse) and *ḥimār* (a donkey). If the plural word would imply one and two, as it would imply extra, then there will be no meaning to this differentiation. And generality is among the meanings necessary for them to express in their speech, they therefore had to devise a word to express it, as they had specified specific names required for each individual thing. As for those who claim that the generic word refers to only three in number and is pending evidence for more than three, we argue that the word used for three and for higher than three is the same. Thus, if it must be understood in reference to three, it must also be understood in reference to more than three.

Section

As far as the generic word is concerned, all of them necessitate general meanings and there is no differentiation between words that imply commendation (*al-madḥ*) or dispraise (*al-dhamm*) or judgment (*al-ḥukm*). Some of our scholars said that if it is used for

commendation, like the verse of *Qur'ān*: *"And they who guard their private parts"* (*al-Mu'minūn*, 23:5) or dispraise like the verse of *Qur'ān*: *"And those who hoard gold and silver"* (*al-Tawbah*, 9:34), then they should not necessitate general meanings. This is not true because a statement of commendation and dispraise affirms the encouragement and the discouragement of it, therefore, it should not become a hindrance to the general meaning.

Section

When general words are stated, is it necessary to believe in their generality and to work with the generality of their imports before looking for that which may specify them? Our scholars had different opinions on this; Abū Bakr al-Ṣayrafī said that it is necessary to practice its necessity and to believe in its general meaning as long as it is not known to have any specifiers. The majority of our scholars like Abū al-'Abbās, Abū Sa'īd al-Iṣṭakhrī[51] and Abū Isḥāq al-Marwazī[52] believe that it is not necessary to uphold its generality unless after enquiring the evidence of specificity; if enquiry nothing that would make it specific is found, then its generality is accepted. This is the right opinion, due to the argument that the requirement for the generality is the absolute wording (*al-ṣīghah al-mutajarridah*), and the absoluteness of it is unknown except after contemplation and research, thus it is not right to believe in its generality before that.

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51 He is al-Ḥasan ibn Aḥmad ibn Yazīd Abū Sa'īd al-Iṣṭakhrī, a Shafi'ite jurist who used to be a judge of Qom. He wrote books, for instance, *Adab al-Qaḍā'* and *al-Farā'id al-Kabīr*. He died in 328H.

52 He is Ibrāhīm ibn Aḥmad Abū Isḥāq al-Marwazī, a Shafi'ite jurist and among the great leader of Shafi'ite school in Baghdād after Ibn Surayj. Among his works is *Sharh al-Mukhtasar al-Muzni*. He died in 240H.

[19]

THE VALIDITY AND THE INVALIDITY OF CLAIMING GENERALITY

In general, generality could be claimed in any explicit speech (*nuṭq ẓāhir*), which its word absorbs the genus, like the words we mentioned in the first chapter. However, as for actions (*al-afʿāl*), it is not valid to claim generality in it because it involves only one characteristic (*al-ṣifah*); whenever the characteristic is identified then the law will be specifically based on that; but if you could not identify it, then, it becomes ambiguous (*mujmalan*) as opposed to that the characteristic or which is identified. This is like what was narrated from the Prophet—may Allāh honour him and grant him peace—that he combined two prayers in journey.[53] This is specifically applied to what is in the narration, and that is journey, and should not apply generally to what is not mentioned in the narration. As for that which is unknown, it is like in the narration that the Prophet—may Allāh honour him and grant him peace—combined two prayers in journey, but it is unknown whether it was a long or short journey, although it is certain that this refers to a specific journey. Thus, when the characteristic is not identified, it is necessary to hold judgment until the matter is clarified and not claim generality.

Section

Similarly, in the case of specific adjudications [of the Prophet] (*al-aʿyān*), it is not permissible to claim generality in them. This is like what was narrated that the Prophet—may Allāh honour him and grant him peace—judged that the right of pre-emption (*al-shufʿah*) is for neighbour[54] and that he judged that the penalty for breaking the fast is the expiation (*al-kaffārah*). In this case, it is not permissible to claim generality instead judgment should be witheld because it is possible that the Prophet—may Allāh honour him and grant him peace—judged the right of pre-emption to the neighbour due to a special characteristic or that he stipulated the expiation as penalty for

[53] Narrated by al-Bukhārī (1108) and Muslim (704).
[54] Narrated by Abī Shaybān in his al-Muṣannaf (5:325).

breaking the fast by sexual intercourse, or in other cases for certain specific characteristics that the case involves. Thus, based on this, it is not permissible to apply the ruling of a specific adjudication to other cases unless there is a statement in the narration that indicates generality.

Among the scholars, there are those who said that if the narration is that the Prophet—may Allāh honour him and grant him peace—ruled that there is the expiation for breaking the fast and that the right of pre-emption is for the neighbour, then, it should not imply generality. But if the narration stated that the Prophet—may Allāh honour him and grant him peace—asserted that the right of pre-emption is for the neighbour or that expiation is the penalty for breaking the fast, then it implies generality because that is a report of a saying (*ḥikāyat qawl*), as if he said: 'The expiation is for breaking the fast and the right of pre-emption is for the neighbour'. Other scholars said that if the narration is that he (the Prophet—may Allāh honour him and grant him peace) used to judge, then, it is considered general as it shows continuance (*al-dawām*); as you can observe the statement *"A person has used to entertain the guest and do good deeds"* and the *Qur'ān*: *"And he used to enjoin on his people prayer"* (*Maryam*, 19:55) which indicates repetition. What is right here is that there is no distinction between the narration by 'indeed' (*inna*) or other because the word *inna* can also be narrated concerning a specific adjudication (*al-qaḍā'*) in reference to the specific characteristic in the matter on which the ruling was pronounced to mean specifically the ruling on the characteristic of the object of judgment (*al-maqḍī fīhi*) and it does not necessitate that the ruling is applicable to another matter. Similarly, there is no distinction between using the word 'used to' (*kāna*) or other than that because although it necessitates repetition, it is possible that the repetition is on a specific characteristic which other issues may not share.

Section

Similarly, with the ambiguous expression (*al-mujmal min al-qawl*) that necessitates an implided meaning [that must be estimated in order for the sentence to communicate a full meaning], it does not, when specified, imply generality. This is like the *Qur'ān*: *"Hajj are months well known"* (*al-Baqarah*, 2:197). This verse needs to be specified. Some of the scholars specify the meaning to be 'the period of ritual consecration of the pilgrimage (*iḥrām al-ḥajj*) is of several specific

months', while the others specify it to mean 'a period of performing the pilgrimage is of several specific months'. Thus, to apply both meanings is not permissible, instead, the meaing indicated by an evidence to be the one intended should be applied. This is because the generality is of the characteristics of speech (*al-nuṭq*) thus it cannot be claimed for implicit meanings (*al-ma'ānī*).

Based on this, those who consider the sayings of the Prophet—may Allāh honour him and grant him peace: *"There is no prayer for those who live near the mosque except in the mosque"*;[55] *"There is no marriage except with legal guardian (waliy)"*;[56] *"The mosque is prohibited for those who are in a state of major ritual impurity (al-junub) and those who are menstruating (al-ḥā'id)"*,[57] and *"the Pen (al-Qalam) is lifted from three..."*,[58] and the like as ambiguous expression (*mujmal*), then, it is not permissible for them to apply generality to it because they consider the intended meaning other than what is stated and that it is possible to mean something and not something else. Thus, generality cannot be claimed in it.

Some of the jurists said that in such case as generality may be claimed every possible meaning as that is most beneficial, while other jurists consider generality only in those implicit meanings debated over, because the others are established by the consensus. However, all these opinions are wrong as we have explained—to apply generality on everything is not permissible and that there is no linguistic form that necessitates generality. Also it is not permissible to apply it to controversial issues (*mawḍi' al-khilāf*) only, because understanding a term in its general sense in a matter in which thre is difference of opinion and a matter where there is no difference of opinion is the same, therefore it is not permissible to limit it only on controversial issues.

55 Narrated by al-Dāruquṭnī in his *al-Sunan* (1:420), al-Ḥākim (1:373), and al-Bayhaqī in his *al-Sunan* (3:57 and 174).

56 Narrated by Abū Dāwūd (2085), al-Tirmidhī (1101), Ibn Mājah (1881), Aḥmad (4:394, 413 and 418), Ibn Ḥibbān (1243, 1244, 1245), and al-Ḥākim (2:170).

57 Narrated bu Abū Dāwūd (232) and Ibn Mājah (645).

58 Narrated by Abū Dāwūd (4403), al-Nasā'ī (6:156) and Ibn Mājah (2041).

[20]

THE SPECIFIC (*AL-KHUṢŪṢ*)

The specification (*al-takhṣīṣ*) is to distinguish a part of a whole from the rest with a particular ruling. It is on this basis, that it is said: such and such is specific to the Prophet—may Allāh honour him and grant him peace, and such and such is specific to other than the Prophet—may Allāh honour him and grant him peace. While the specification of the general (*takhṣīṣ al-'umūm*) is to explain what was not stated by the general statement.

Section

It is permissible that specification is applied to all general statements, namely commands (*al-amr*), prohibitions (*al-nahy*) and narrations (*al-khabar*). Some scholars said that specification is not applicable for narrations as in the same way abrogation (*al-naskh*) is not applicable to narrations. But, this is not true as we have explained that specification is an explanation of what was not mentioned in the general statement. This is valid in narrations as it is valid in commands and prohibitions.

Section

It is permissible that a general word be specified until there remains but a single meaning. Abū Bakr al-Qaffāl[59] of our school said that it is permissible to do specification on the plural nouns to end up at three [meanings] and not more than that. The argument that that (i.e. to end at one meaning) is permissible is because it is of general statements, therefore, it is possible for a general statement to be specified to arrive at one meaning. This is like the ambiguous nouns (*al-asmā' al-mubhamāt*) such as 'who' (*man*) and 'what' (*mā*).

59 He is Muḥammad ibn 'Alī ibn Ismā'īl al-Shāshī al-Qaffāl, among the great scholars of his time at Transoxiana (*mā warā' al-nahr*) who mastered various sciences including *fiqh*, *ḥadīth*, language and literature. He authored *Uṣūl al-Fiqh* dan *Maḥāsin al-Sharī'ah*. He spreads the school of al-Shāfi'ī in Transoxiana. He died in 365H.

Section

When a meaning is specified from the generality, this word will not become metaphorical for the remaining the meaning. The Mu'tazilite said that it becomes metaphorical, and al-Karkhī said that if it is specified by connected word (*lafẓ muttaṣil*) like in exception (*al-istithnā'*) and condition (*al-sharṭ*), then, it will not become metaphorical (i.e. for the rest of the meaning). But, if it is specified by a disconnected word (*lafẓ munfaṣil*), then, it becomes metaphorical. This is also the opinion of al-Qāḍī Abū Bakr al-Ash'arī.[60]

The argument against the Mu'tazilite in particular is that the original usage [of a word] is the real (*al-ḥaqīqah*) [meaning], but sometimes we encounter exceptions (*al-istithnā'*) and conditions (*al-sharṭ*) in the usage just like in other than these of various kinds of speech, thus it shows that it is real (*ḥaqīqah*). While the argument against the others is that the [general] word (*al-lafẓ*) covers each individual member of a genus, but when any of it is excluded due to some evidence, then the rest [of the members of that genus] will remain as necessitated and encompassesd by the general word, thus it is literal (not metaphoric).

[60] He is Muḥammad ibn al-Ṭayyib b. Muḥammad ibn Ja'far Abū Bakr al-Bāqillānī, a theologian and among the leader of Ash'arite school. He is brilliant in intellectual discourse and debate. He wrote *I'jāz al-Qur'ān*, *al-Inṣāf*, *al-Tamhīd fi al-Radd 'alā al-Mulḥidah wal-Mu'aṭṭilah* and others. He died in 403H.

[21]

WHAT IS PERMISSIBLE TO BE SPECIFIED AND WHAT IS NOT?

In general, it is permissible to specify general words. As for specifying what is implicit in speech (*faḥwā al-khiṭāb*), like to specify what is implied in the Qur'ānic verse: *"Say not to them a word of contempt"* (*al-Isrā'*, 17:23), it is not permissible; because specification is applicable to the explicit words of speech and this is the meaning of the speech. Also because by specifying it, it contrasts the meaning to which the prohibition is related. Don't you see that if it is said: 'Do not express to any of your parents anger but do beat them'. This would be a contradictory statement? And it would be like specifying the analogical basis [of the ruling].

Section

As per specification of what is proven implicitly by the speech, it is permissible because it is like the speech (*al-nuṭq*), which is permissible to be specified. When someone said: "a charity (*zakāt*) [is obligatory] for freely grazing goats (*sā'imah*)". This shows that there is no charity for the fed goat (*al-ma'lūfah*). [If someone said:] "There is no charity for the fed goat" [it is likewise possible] to specify it to one category of fed goats and not to other categories.

Section

As for the unambiguous religious text (*al-naṣṣ*), it is not permissible for it to be specified, like the saying of the Prophet—may Allāh honour him and grant him peace—to Abū Burdah: "It will be valid for you but not for anyone after you", because specification means to exclude some of the meaning of speech and this is not valid for a religious text that is unambiguous concerning on specific thing.

Section

Similarly, actions (*al-af'āl*) that occur, it is not possible for them to be specified because—as we explained before—actions cannot be of two qualities (*ṣifatayn*) from which one of them will be excluded based on an evidence; thus, if an evidence shows that it did not occur except in accordance to one of the two qualities, then this is not specification.

[22]

THE EVIDENCES WITH WHICH SPECIFICATION IS AND IS NOT PERMISSIBLE

The arguments with which specification is permissible are of two kinds: connected (*muttaṣil*) and disconnected (*munfaṣil*)

The connected argument is exception (*al-istithnā'*), condition (*al-sharṭ*) and confinement by the quality (*al-taqyīd bil-ṣifah*). These have several discussions that will be elaborated later, by God's will. As for the disconnected argument, it is of two perspectives; the perspective of the reason (*al-'aql*) and that of religious law (*al-shar'*). The perspective of reason is of two kinds:

First: That, the opposite of which the religious law (*al-shar'*) can possibly mandate. This is like what the reason necessitates regarding the relief of one's conscience (*barā'at al-dhimmah*). In this case, specification with it is not permissible because that is resorted to in the absence of the religious law; but when there is the religious law then the judgment will follow the religious law.

Second: That which the religious law could not possibly reveal the opposite. This is like what the reason argued regarding the denial of the creation of God's Attributes, here specification with it is permissible. Therefore, we specified the verse: *"Allāh is the Creator of all things"* (*al-Zumar*, 39:63) concerning the Attributes and we said that the verse refers to everything except the Attributes because the reason has established that it is not possible that God created His Attributes. Thus, we specified the generality with this.

Section

As for that which can be used to specify with, from the perspective of religious law, it is of several kinds: the word of the *Qur'ān* and the Prophetic Tradition and their message, the actions of the Prophet—may Allāh honour him and grant him peace—and his endorsement (*iqrār*), the consensus of the scholars (*ijmā' al-ummah*) and the analogy (*al-qiyās*).

As for the *Qur'ān*, it is permissible to be specified by the *Qur'ān*, like the verse: *"and chaste women from among those who were given the Scripture..."* (*al-Mā'idah*, 5:5) that specifies the verse: *"And do not marry polytheistic men [to your women]..."* (*al-Baqarah*, 2:221). It is also permissible to specify the Prophetic Tradition (*al-Sunnah*) with the *Qur'ān*. Some scholars said that this is not permissible. The argument that this is permissible is that the chains of narration of the *Qur'ān* are established but not in the case of the Prophetic tradition, thus, since it is permissible to specify the *Qur'ān* with the *Qur'ān* then certainly it is also permissible for the Prophetic tradition to be specified by it.

Section

As for the Prophetic tradition, it is permissible to specify the *Qur'ān* with it. This is like the saying of the Prophet—may Allāh honour him and grant him peace: *"the killer does not inherit"*.[61] This specifies the *Qur'ān*: *"Allāh (thus) directs you as regards your Children's (Inheritance)"* (*al-Nisā'*, 4:11). Some theologians said that the *Qur'ān* cannot be specified by merely solitarily transmitted Prophetic tradition.

'Īsā ibn Abān[62] said that if the specification is supported by an argument, then, it is permissible to specify it (the *Qur'ān*) with merely solitarily transmitted Prophetic tradition, but if it is not supported by an argument, then it is not permissible.

The argument that this is permissible is that both are valid evidence; one of them is specific and the other is general, therefore the specific among them confines the general, as in the case where both are from the *Qur'ān*. As for the argument against those who differentiated between whether it was specified by something else other than the solitarily transmitted Prophetic tradition or not[63] is: the reason it can be specified by something [i.e. evidence from the Book and *mutawātir* traditions] is that the specific word contains the particular ruling in an unambiguous manner (*lafẓ ghayr muḥtamal*), while the general word contains it ambiguously (*lafẓ muḥtamal*). And this meaning is present even when specification is not indicated by

61 Narrated by al-Tirmidhī (2109), Ibn Mājah (2645), and al-Dāraquṭnī (4:54).

62 He is 'Īsā ibn Abān ibn Ṣadaqah, Abū Mūsā, one of great Ḥanafīte jurist. Among his works are *al-Ḥujjat al-Ṣaghīrah*, *al-Jāmi'*, *Ithbāt al-Qiyās* and others. He died in 221H.

63 i.e., the argument against 'Īsā ibn Abān.

[the Book and *mutawātir* traditions] but is by solitarily transmitted traditions.

Section

It is permissible to specify the Prophetic Tradition with the Prophetic Tradition. This is like the tradition of the Prophet—may Allāh honour him and grant him peace: *"Why don't you take its hide, tan it, and benefit from it?"*,[64] that specifies his saying: *"Do not take benefit from anything of the corpse [of an animal that died without being slaughtered according to Shar'ī legulations] (al-maytah)"*.[65]

Some scholars said that this is not permissible as the Prophetic Tradition is meant for further explanation, thus, the explanation should not need other explanation.[66] Some of the Ẓāhirite (*ahl al-ẓāhir*) claimed that the specific (*al-khāṣṣ*) and the general (*al-'ām*) contrast each other, and this is the opinion of al-Qāḍī Abū Bakr al-Ash'arī. The argument for what we said will be elaborate later, by God's Will.

Section

As for implicit meaning (*al-mafhūm*),[67] it is of two types: Implicit meaning that purports a concurrent meaning as the stated speech that is (*faḥwā al-khiṭāb*) and implicit meaning that establishes the opposite of the stated speech the argument of speech (*dalīl al-khiṭāb*). As for the implicit meaing that purports a concurrent meaning as the stated speech, it is notification (*al-tanbīh*). And specification with it is permissible. This is like the verse of the *Qur'ān*: *"say not to them a word of contempt"* (*al-Isrā'*, 17:23). This verse, according to al-Shāfi'ī, indicates the law by its meaning, except that it is an obvious meaning. However, according to the opinion of others, this verse indicates the law by its words and it is like an unambiguous revealed text (*al-naṣṣ*).

64 Narrated by Muslim (363), al-Tirmidhī (1727), Abū Dāwūd (4120), al-Nasā'ī (4564), and Ibn Mājah (3615).

65 Narrated by Abū Dāwūd (4127), al-Tirmidhī (1729), al-Nasā'ī (7:175) and Ibn Ḥibbān (1278). *Al-Maytah* specifically refers to the corpse of an animal not slaughtered in accordance with ritual requirements in Islam.

66 i.e., The Prophetic tradition serves as an explanation for the *Qur'ān*. Thus, it should not itself be in need for that which will clarify it.

67 That is the meaning of the religious text, namely, the *Qur'ān* and the Prophetic tradition.

As for the argument of speech, which is the opposite of the articulated speech (*al-nuṭq*), and it is permissible to specify the general with it. Abū 'Abbās ibn Surayj said that specification with it is not permissible, and this is the opinion of scholars of Iraq, because for them, this is not an argument [of the speech]; the discussion on this opinion will be elaborated later by Allāh's will. For us it is a legal evidence, like the articulated speech (*al-nuṭq*) in one of two opinions, and like analogy (*al-qiyās*) in another opinion, and thus, in any of these cases specification by it is permissible.

Section

On contradiction of two words: Whenever there is a contradiction between two words it is either that both words are specific or general or one is specific and the other is general; or both of them are in one aspect specific and in another aspect general. If both are specific, for instance, you say: 'Do not kill the apostate (*al-murtad*)', and 'Kill the apostate', or 'Pray a prayer for no reason when the sun rise' and 'Do not pray a prayer for no reason when the sun rise'; these statements cannot occur except in two different times and one of them is abrogative of the other, if we know their chronology, then, the former is abrogated by the later, but if we do not know it then it is obligatory to hold judgment (*tawaqquf*).

If both words are general, for example you say: 'Whoever changes his religion (*man baddala dīnahu*) kill him' and 'Whoever changes his religion do not kill him'; and 'Perform the prayer when the sun rises' and 'Do not perform the prayer when the sun rises'. In this case, if it is possible to use both of them in both situations, then do use both of them, like in the saying of the Prophet—may Allāh honour him and grant him peace: *"The best witness (al-shuhūd) is those who witnesses before he was asked to witness"*,[68] and his saying: *"The worst witness is those who witnesses before he was asked to witness"*.[69]

[On this matter], our scholars said as for the first: This is applied when he witnesses while the person in the truth does not know that he has a witness; indeed, it is preferable that he witnesses for the person even if he was not asked, so that the person he witnesses for will gain his right. As for the second, this is applied when the person

[68] Narrated by Muslim (1719), Mālik in his *Muwaṭṭa'* (2:720), Aḥmad (4:115), Abū Dāwūd (3596), and al-Tirmidhī (2295).

[69] Narrated by Muslim (2534) and Aḥmad (2:228).

in the truth knows that he has a witness. In this case, it is not preferable for the witness to offer his witness before he was asked to do so.

However, if it is not possible to use both of them, then it is obligatory to hold judgment, like the previous case.

If one of the word is general and the other is specific like in the *Qur'ān*: *"Prohibited for you are dead animals"* (*al-Mā'idah*, 5:3) as compared to the saying of the Prophet—may Allāh honour him and grant him peace: *"The hide of any dead animal is pure once it has been tanned"*,[70] and like his saying: *"Vegetation that has been watered by the sky, its zakāt is ten percent"*,[71] as compared to his saying: *"...There is no zakāt on less than five awsuq of dates"*.[72]

In this particular case and the likes, it is necessary that the general be judged by the specific. Some of our scholars said that if the specific comes later and the general is earlier then the specific, to its extent, abrogates the general. This is based on the fact that it is not permissible to delay the explanation [of the law] from the time of the speech; and this is the opinion of the Mu'tazilite. Some of the Ẓāhirite (*ahl al-ẓāhir*) said that both the specific and the general are conflicting each other, and this is the opinion of al-Qāḍī Abū Bakr al-Ash'arī. The scholars of Abū Ḥanīfah said that if the specific is disputed (*mukhtalaf fih*) while the general is agreed upon (*mujmā' 'alayh*), then do not judge the general with the specific, but if the specific is agreed upon then judge with it. The argument for what we said is that the specific is stronger than the general because the specific expresses the law with an exact word while the general expresses it with an ambiguous word (*lafẓ muḥtamal*), therefore, it is necessary to judge it with the specific.

As for in the case where both of them are in one aspect general and in another aspect specific, then the specific aspect of each of them may specify the general aspect of the other. This is like what was narrated from the Prophet—may Allāh honour him and grant him peace—that *"He prohibited performing the prayer during sunrise"*[73] and his saying: *"Whoever slept and did not perform the prayer or forgot it,*

[70] Narrated by al-Tirmidhī (1728), Aḥmad (1:279 and 280) and Ibn Ḥibbān (1288).

[71] Narrated by al-Bukhārī (1483), Abū Dāwūd (1596), al-Tirmidhī (1:125), al-Nasā'ī (5:41), Ibn Mājah (1817).

[72] Narrated by al-Bukhārī (1405), Muslim (979), Abū Dāwūd (1558), al-Tirmidhī (626), and Ibn Mājah (1793).

[73] Narrated by al-Bukhārī (1523) and Muslim (831).

he should perform it when he remembers".[74] Here, the prohibition from performing the prayer during sunrise probably refers to the prayers for which there are no specific juristic reason because he said: "Whoever slept and did not perform the prayer or forgot it, he should perform it when he remembers". Also, it is possible that his saying: *"Whoever slept and did not perform the prayer or forgot it, he should perform it..."* refers to the situation other than sunrise because of what was reported from the Prophet—may Allāh honour him and grant him peace—that he prohibited performing the prayer during sunrise. What is necessary in this case is that one should not give priority to any of the two possibilities except when there is a legitimate argument—from other than both of them—that indicates the specified of the two, or there is preponderance for one of the two.

This is also like what was reported from 'Uthmān and 'Alī b. Abī Ṭālib—may Allāh be pleased with them—on combining between two sisters [in marriage], which was permitted in one verse and forbidden in another,[75] but the prohibition of it is more appropriate.

In such situation, is it possible for it not to have preponderance (*al-tarjīḥ*)? Some of the scholars said that this is not possible but others said that it is possible and when there is no preponderance, the two verses are contradicting and both are dropped, then the jurist (*al-mujtahid*) resorts to the principle of initial non-obligation (*barā'at al-dhimmah*).

Section

As for the actions of the Prophet—may Allāh honour him and grant him peace, it is permissible to specify with it. This is like when he prohibits things with a general expression and then he himself does some of those things, thus, the general expression is then specified by his action. Some of the scholars said that it is not permissible to

[74] Narrated by al-Bukhārī (597) and Muslim (684).

[75] The narration by 'Uthmān was stated by al-Shāfi'ī in his *Musnad* (2: 16) that a man asked 'Uthmān ibn 'Affān about two sisters who are slaves, can we marry both of them together? He said: It was permitted in one verse and forbidden in the other verse, and as for me I do not like to do this. While the narration by 'Alī, it was stated by al-Bazzār as in *Kashf al-Astār* (1438) that Ibn al-Kawwā' said to 'Alī: Tell me about two sisters who are slaves. He said: Two sisters who are slaves, they were forbidden in one verse and permitted in other verse, I will not permit nor forbid it, will not order nor prohibit it, I will not practice it and neither any of my family does.

specify with it, and this is the opinion of some of our scholars, because the actions done could have been specifically permitted for him—may Allāh honour him and grant him peace. The former opinion is the most valid because although the action could have been permitted specificially for the Prophet—may Allāh honour him and grant him peace, the principle is that the Nation (*ummah*) shares with him in the laws [except when a proof exempts him or them]. This is why Allāh says: *"Verily, there is for you in the Messenger of Allāh the best of example"* (*al-Aḥzāb*, 33:21).

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As for the endorsement (*taqrīr*) of the Prophet—may Allāh honour him and grant him peace, it is permissible to specify with it as in the narration that he—may Allāh honour him and grant him peace—"saw Qays praying the two-*raka'at*-prayer [that is recommended to be done before] the morning-prayer (*al-fajr*) after dawn and he endorsed it for him".[76] Thus, the prohibition of the Prophet—may Allāh honour him and grant him peace—on performing prayers after the dawn[77] is specified with this because it is not permissible for him to endorse any forbidden things he saws, so whenever he endorses something, it shows that it is permissible.

Section

As for the consensus (*al-ijmā'*) it is permissible to specify with it because it is stronger than many apparent meanings of revealed texts (*al-ẓawāhir*), thus, if it is permissible to specify with the apparent meanings of revealed texts, then, to do so with the consensus is prior.

Section

As for a saying of a single Companion of the Prophet—may Allāh honour him and grant him peace—that spreads and it is known that there was another Companion who opposed it, then it is not permissible to specify with it. But if it is not known that there was

[76] Narrated by al-Tirmidhī (422), Abū Dāwūd (1267) and Aḥmad (5:447).

[77] As in the *ḥadīth* by Abū Hurayrah that the Prophet—may Allāh honor him and grant him peace—prohibited the performance of the prayer after the prayer of *Fajr* until the sun rise, narrated by al-Bukhārī (584) and Muslim (825).

another Companion who opposed it, then it is an authoritative source (*ḥujjah*) and therefore is permissible to specify with it. However, if it was not widespread; if it is opposed by another [Companion], then it is not permissible to specify with it. But, if it is not contradicted by another Companion, is it permissible to specify with it? This depends on two opinions on whether it is an authoritative source or not; if we say that it is not, then it is not permissible to specify with it. But if we say that it is then is it permissible to specify with it or not? There are two opinions; the first is that it is permissible, and second is that it is not.

Section

As for the analogy (*al-qiyās*), it is permissible to specify with it. Among our scholars said that it is not permissible to specify with it, this is the opinion of Abū 'Alī al-Jubbā'ī and it is the preference of al-Qāḍī Abū Bakr al-Ash'arī.

'Īsā ibn Abān said: If its specification is established based on an argument that necessitates knowledge, then, it is permissible to specify with it. But, if its specification is not established by an argument that necessitates knowledge, then, it is not permissible.

Some scholars of Iraq said that if specification has been proven by evidence other than the analogy, then, it is permissible. But, if specification has not been proven by other evidences, then it is not permissible. The argument that it is permissible is that the analogy accomodates the ruling in an unambiguous word (*lafẓ ghayr muḥtamal*) which can specify the general term. So, just as how the unambiguous word can specify the general, analogy on the unambiguous specifying word can likewise specify the general expression.

Section

As for the saying of a transmitter (*al-rāwī*), it is not permissible to specify a general expression with it. The Ḥanafīte scholars said that it is permissible. The argument that it is not permissible is that a generality may be specified by some evidence or that which seems to be an evidence (*shubhah*), but the apparent [generality] (*al-ẓāhir*) should not be neglected based on doubt (*al-shakk*). Similarly, it is not permissible to specify [a generality] based on the transmitters word or opinion, like when the narration has two probable meanings and one of them is more evident but the transmitter prefers the other

meaning. This is not accepted as we explained regarding specification of the generality. However, if the expression has two probable meanings and they are of the same quality, and the transmitter prefers one of them, like the narration from 'Umar—may Allāh be pleased with him—that he apprehends the saying of the Prophet—may Allāh honour him and grant him peace: *"Gold for gold is an interest except by hā' and hā'"*[78] as a proper barter deal (*al-qabḍ fī al-majlis*). In this case, it was said that this is accepted because he knows better the meaning of the statement. For me, it needs to be reflected.

Section

As for customs (*al-'urf*) and common practices (*al-'ādah*), it is not permissible to specify generalities with it because Islamic jurisprudence is not based on the commons practices [of people]. In fact, it is based on public welfare (*al-maṣlaḥah*) according to some scholars, while for the rest of the scholars they assert that it is based on what Allāh wants and neither is dependent on common practice.

Section

It is not permissible to specify the beginning of a verse with the end of it or vice versa. This is like the verse: *"Divorced women shall wait by themselves for three monthly periods"* (*al-Baqarah*, 2:228) which applied generally for the divorcee whose divorse can be retracted within the waiting period (*al-raj'iyyah*) and others, then, at the end of the verse comes: *"And their husbands have more right to take them back"* (*al-Baqarah*, 2:228) and this is specific for divorcees whose divorses can be retracted within the waiting period. In this case, the first part of the verse should be understood in the general sense while the last part in the specific sense, but the first part should not be specified by the last part [of the verse]; because it is possible that the last part [of the verse] is meant to explain issues contained in the first part of verse. Therefore, it is not permissible to neglect the general [message] in the beginning of the verse due to the specific meaning at the end.

[78] Narrated by al-Bukhārī (2134) and Muslim (1586). *Ha'* and *ha'* literally means 'here, take it' (*hāka* - pl. *hākum*). It means that one of two persons says 'take this' and the other also says 'take this'.

[23]

EXPRESSIONS STATED FOR SPECIFIC REASONS (*AL-SABAB*)

Generally, it is not permissible to dismiss the reason for which the expression is stated because it will lead to the delay of the explanation from the time it is needed and this is not permissible. But what about including in it other situations (than the specific one in which the expression was uttered)?

In this case, you need to observe; if the expression is in itself dependent, then it becomes confined to the reason mentioned in the expression and the judgment together with the reason becomes like a single entity.

But, if the expression of the questioner was general, like him saying: 'I invalidated my fast (by willful sexual intercourse)', and he answered: 'Set free [a slave]', then the answer should be understood as general for all who break the fast (by willful sexual intercourse). It is like if he said: 'Whoever breaks the fast, he must set free the slave'. That is from the aspect of meaning and not from the aspect of expression. This is because when the circumstances of a narration was not detailed [whie it is possible for it to be applied to many different situations], it shows that it does not differ (from situation to situation), or when it mentions the reason, i.e. breaking the fast, then freeing the slave is the stipulated ruling for that matter. It, thus, becomes as if he is explaining the justification for the judgment, because stating the reason in a judgment indicates its justification.

However, if it (i.e. the expression of the questioner) is specific, like if he said: 'I commited sexual intercourse', to which the Prophet replied: 'Set free [a slave]', here the answer should be understood as specific to invalidating the fast by sexual intercourse, and should not be generalized to other invalidator of the fast. It is as if he said: 'whoever commits sexual intercourse in [the day of] Ramaḍān, he has to set free [a slave]'.

But, if the expression is in itself independent, then the law carried by the expression is what is condsidered; if it is specific then the ruling is specific and if it is general then the ruling is general and it should not be specified based on the reason mentioned in it. This is

like when the Prophet—may Allāh honour him and grant him peace—was asked about the Buḍā'ah well (*bi'r buḍā'ah*),[79] it was said: 'You make ablution from the Buḍā'ah well into which menstruation cloths (*al-maḥā'id*), dog meat (*luḥum al-kilāb*) and waste materials are thrown', then the Prophet—may Allāh honour him and grant him peace—said: *"Water is pure, nothing pollutes it"*[80] except that which changes its taste or smell. This expression should be understood in a general sense and should not be specified to the reason mentioned. Mālik, al-Muznī,[81] Abū Thūr,[82] and Abū Bakr al-Daqqāq[83] of our scholars said that it should be limited to the reason mentioned. The basis of what we are saying is that the evidence is in the saying of the Prophet—may Allāh honour him and grant him peace—and not in the reason, therefore, its generality is what should be considered.

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79 It is one of the famous well in Madinah in the time of the Prophet—may Allāh honor him and grant him peace. The name was said to be either the name of the owner or the name of the place.

80 Narrated by Abū Dāwūd (66), al-Tirmidhī (66), al-Nasā'ī (1:174) and Aḥmad (3:31). It is important to note that, according to *'Awn al-Ma'būd Sharḥ Sunan Abī Dāwūd*, the *ḥadīth* does not mean that people are throwing all those things directly into the well but they threw them behind their house where, in this case, is the place through which the water flew into the well, that is when the rain comes and falls onto the waste and flows into the well. See Muḥammad Shams al-Ḥaqq Abadī, *'Awn al-Ma'būd* (n. p.: Dār al-Fikr, 1995), 1:106.

81 He is Ismā'īl ibn Yaḥyā Abū Ibrāhīm al-Muzanī, one of the great Shafi'ite scholars in Egypt. He wrote *al-Jāmi' al-Ṣaghīr*, *al-Jāmi' al-Kabīr* and *al-Mukhtaṣar*. He died in 264H.

82 He is Ibrāhīm ibn Khālid ibn Abī al-Yaman al-Kalbī al-Baghdādī, the Shafi'ite jurist. He died in 240H.

83 He is Muḥammad ibn Muḥammad al-Baghdādī, a jurist and *uṣūlī* who wrote a *Sharḥ al-Mukhtaṣar*. He died in 392H.

[24]

EXCEPTION (*AL-ISTITHNĀ'*)

It is permissible to specify an expression with an exception (*al-istithnā'*). This is understood from the saying [of the Arabs]: "I divert (*thanaytu*) someone from his opinion" to mean 'I turn him away from it'. Some said that it is understood from 'doubling' a report (*tathniyyat al-khabar*)[84] after a report.

Among its conditions is that it must be adjoined to the exempted (*al-mustathnā minhu*). Ibn 'Abbās was reported to have said that it is acceptable to delay the exempted. While others were reported to have said that the delay is acceptable provided that there is a statement indicating that it is an exception from what was mentioned previously. This is like if he said: 'The people came to see me', then after sometime he said: 'except Zayd'. This is of an exception to what he said. As for that which was reported from Ibn 'Abbās, it is clearly an invalid report from him, as it is far [from truth] because the Arabs do not use the exception except by adjoining it with the expression. Don't you see that when someone says: 'The people came to see me', then after a month he says: 'except Zayd', all this will not be considered as a single statement, therefore, it shows that this is invalid.

Similarly, what was reported from the others is incorrect because if it is acceptable in the way they said, then it would be acceptable to delay the predicate (*al-khabar*) from the subject (*mubtada'*) and then be uttered later on with a statement to indicate it, for instance you say: 'Zayd', and then after a while you say: 'who stand' (*qā'im*), and you relate this with something indicating that this is a predicate of that (the subject). This is something that none will say is acceptable and it is not considered as a statement in [Arabic] language, therefore, it is invalid.

[84] It means to include the meaning or message in both reports like when we say: 'the people are praying except Khālid', meaning that the prayer is in both reports; in 'the people are praying' and in 'except Khālid', although it

Section

It is permissible for the exception to precede the excepted as well as to be preceded by it, just like the saying of al-Kumayt ibn Zayd al-Asadī:

I do not possess except the family of Aḥmad as adherents,
And I do not possess except the true tribe[85]

Section

Exception from a genus (*al-jins*) is permissible, like you say: 'I saw the people except Zayd'; also to exempt something which is part of the noun, like you say: 'I saw Zayd except his face'.

As for an exception from other than the genus, it is commonly used. It is present in the language of the *Qur'ān* and poems. The *Qur'ān* says: *"So the angels prostrated themselves, all of them together, except Iblis, he refused to be among those who prostrated themselves"* (*al-Ḥijr*, 15:30-31). Iblīs was excluded from the Angels and is not among them. The poet says:

I wait there the whole evening so that I can ask
The answer remained unannounced, for there was nobody in the area
Except the wild animals. This I slowly came to realize.
But even the slightest ditch is like a pond to a solid desert land.[86]

Here, the wild animals are excluded from "the people". But is this literal or metaphoric? There are two opinions: Among our scholars, there are those who said that it is literal (*ḥaqīqah*) while others said that it is metaphorical (*majāz*). This view is more appropriate because "the exception" is derived from their saying: 'I diverted the rein of the riding animal', when I turn it away, or from doubling a report

[85] The original expression is *fa-mā lī illā Āli Aḥmad shī'atan; wa-mā lī illā mash'abu al-ḥaqq mush'ab*.

[86] This is a free translation of the poems from *Dīwān al-Nābighah*:
waqaftu fiha asīlan kay usā'iluhā;
a'itu jawāban wa-mā fī al-rab' min aḥad;
illā al-uwrāya li-ayyan mā ubayyinuhā;
wal-nu'ya kal-hawdi bil-maslūmati al-jald

one after another, and this does not happen except when one started a particular speech and complete it (i.e. only then can he begin another).

Section

It is permissible to except the majority (*al-akthar*) from a group. Aḥmad said that it is not permissible, and it is the opinion of al-Qāḍī Abū Bakr al-Ash'arī and Ibn Durustawayh.[87] The argument for its permissibility is that the Qur'ān employed this language, as in the verse: *"Indeed, My servants - no authority will you have over them, except those who follow you of the deviators"* (*al-Ḥijr*, 15:42), then, the verse says: *"(Iblīs) said: Then, by Thy power, I will put them all in the wrong; Except Thy Servants amongst them, sincere and purified (by Thy Grace)"* (*Ṣād*, 38:82-83). Thus, it excludes the deviators from the servants and excludes the servants from the deviators; it excepts any of the two which has the most number from the rest. And as exception is a notion that necessitates specification of a general expression, then, it is permissible for the few as well as the many, similar to specification with a disconnected argument (*al-dalīl al-munfaṣil*).

Section

In the case when the exception succeeds more than one sentence and they are connected to each other, the exception applies to all. It is like in the verse: *"And those who accuse chaste women and then do not produce four witnesses - lash them with eighty lashes and do not accept from them testimony ever after. And those are the defiantly disobedient; except for those who repent"* (*al-Nūr*, 24:4-5).

The Ḥanafīte scholars said that it applies only to that which comes last, and al-Qāḍī Abū Bakr al-Ash'arī said: Judgment must be suspended until an evidence proves one over the rest. The argument for what we said is that in exception is like a condition (*al-sharṭ*) in relation to specification. And the condition refers to all of them together. It is like when someone says: 'My wife is divorced, my slave is freed and my wealth is a charity, with Allāh's Will', it is the same for exception (i.e. it applies to all that preceeded).

[87] He is 'Abd Allāh ibn Ja'far ibn Muḥammad b. Durustawayh, Abū Muḥammad, a linguist who wrote books among others are *Taṣḥīḥ al-Faṣīḥ* and *al-Kuttāb*. He died in 347H.

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If there is an indication that it is not permissible for an exception to refer to any of the stated sentences, as in the verse on slandering (*al-qadhaf*), where there is an indication that it is not permissible to refer the exception in it to the penalty for the crime of slandering, hence, it refers to the other sentences.

Similarly, when the exception precedes a sentence and an indication shows that it should not refer to a part of it, like in the verse: *"And if you divorce them before you have touched them and you have already specified for them an obligation"* (*al-Baqarah*, 2:237) until: *"unless they forego the right"*, here indication indicates that the exception should not refer to children (*al-ṣighār*) and the insane (*al-majānīn*), then refer it to rest of the sentence, because excluding one aspect based on an indication does not necessitate the exclusion of the other aspects which no indication required their exclusion.

[25]

SPECIFICATION IN CONDITION (*AL-SHARṬ*)

The condition (*al-sharṭ*) is that without which the conditioned (*al-mashrūṭ*) is invalid. Sometimes a condition is established by a disconnected argument (*dalīl munfaṣil*) like precondition of the ability (*al-qudrah*) in act of worship, or purity (*al-ṭahārah*) for the prayer, and this is included within what we mentioned regarding specification of generality. Sometimes, a condition may be established by a connected statement, the connective being a conditioning word (*lafẓ al-sharṭ*), like in the verse: *"And he who does not find [a slave] - then a fast of two months consecutively before they touch one another; and he who is unable - then the feeding of sixty poor persons"* (*al-Mujādilah*, 58:4), and a statement of extent or objective (*al-ghāyah*) like in the verse: *"[fight] until they give the jizyah personally by hand, while they are humbled"* (*al-Tawbah*, 9:29). Thus, it is permissible to specify the law with all these; the fasting is necessary for only those who fail to find the slave and fighting only against those who do not pay the tax (*al-jizyah*).[88]

Section

It is permissible for the condition to precede [the conditioned] in the expression as well as to be preceeded by it, as in the case of the exception. Therefore, it makes no different to say: 'You are divorced if you enter the house' or "If you enter the house, you are divorced'.

Section

When the condition is preceeded by more than one clauses then it refers to all, similar to what we said concerning exception. Therefore if someone said: 'My wife divorced, and my slave is free, if Allāh wills', then, neither is the wife divorced nor is the slave freed.

[88] *Jizyah* is a head tax for free non-Muslims under Muslim rule.

Section

However, when the condition relates only to some of the stated clauses and not the others, then, do not refer the condition except to that particular clause. This is like in the verse: *"Lodge them [in a section] of where you dwell out of your means and do not harm them in order to oppress them. And if they should be pregnant, then spend on them until they give birth"* (*al-Ṭalāq*, 65:6). Here, the pregnancy is the condition for the spending (*al-infāq*) and not the dwelling (*al-suknā*), thus the condition refers to the spending and not to the dwelling.

Similarly, if the condition, based on a disconnected evidence (*dalīl munfaṣil*), is established to refer to only some clauses, then it does not refer to the rest of the clauses; like in the verse: *"Divorced women remain in waiting for three periods, and it is not lawful for them to conceal what Allāh has created in their wombs if they believe in Allāh and the Last Day. And their husbands have more right to take them back in this [period] if they want reconciliation"* (*al-Baqarah*, 2:228); There in evidence that indicates that *"to take them back"* here is in reference to those divorcees whose divorces were of such that their husbands can take them back during the waiting period. Thus, this is how the verse must be understood, not as a specification of the first part of the verse.

Similarly, when several clauses are stated with an expression that implies obligation or generality in all sentences and some of them are conjunct to the others, and there is an evidence that indicates that in certain clauses the obligation is not applied, or that in some clauses the generality is not implied, then in this case it is not necessary to apply to the rest of the clauses non-obligation or non-generality. This is like the verse: *"Eat of [each of] its fruit when it yields and give its due [zakāt] on the day of its harvest"* (*al-An'ām*, 6:141) where it orders to eat and to pay the tax. Here, the eating is not an obligation but the payment of the *zakāt* is obligatory, and the eating is applied generally for small and large amount while the payment of the tax only applied when it reaches five freights (*awsaq*). Thus, whatever was proven to be excluded from the generality or obligatoriness of the clause must be exempted, and the remaining clauses will be understood as the expression dictates.

Section

Similarly, when two things are associated to each other in an expression and a law is established for one of them by consensus, it is not necessary to establish this law for the other unless there is an expression that necessitates the same law for both, or there is a juristic reason (*'illah*) that necessitates the association between both. Some of our scholars said that whenever a law is established for one of them, this law is also established for the other due to similar matters (i.e. other legal matters that share the same legal premise). This is not right because the law established on one of them is established based on a specific argument from an expression, or reason, or consensus and those are not applicable for the other. Therefore, it is not necessary to equalize them unless there is a reason that combines them.

[26]

THE ABSOLUTE (*AL-MUṬLAQ*) AND THE CONFINED (*AL-MUQAYYAD*)

Indeed, to confine the general by certain qualities necessitates specification (*al-takhṣīṣ*), as it necessitates condition (*al-sharṭ*) and exception (*al-istithnā'*). This is like the verse: *"then the freeing of a believing slave"* (*al-Nisā'*, 4:92) in which if it has stated 'free a slave', then it would have encompassed both the Muslim and the non-believer. But, since it confined it with the word 'Muslim', it necessitates specification.

Section

If the expression is in an absolute form, with no confinements, it should be understood absolutely. If it is confined without being absolute, it should be understood restrictedly. If it is addressed absolutely in a place and restrictedly in another, it should be considered; if they involve two different laws, like confining [the word] fasting with [the word] continuation (*al-tatābu'*) and mentioning the word feeding (*al-iṭ'ām*) in an absolute way, then do not hold any of them on the other but consider each of them on its own because they do not resemble neither in expression nor in meaning.

But if they involve one law and with similar reason; like it mentions 'the slave' in the expiation of murdering restricted by the word 'believer', then restates it absolutely in murdering, then the law would be in accordance with the confinement; because it is actually one law where the explanation of that single law is clarified in one of two situations.

If it involves one law but of two different things, you should consider the confined one, if it is opposed by other confined statement, then the absolute should not be held on any of the two confined cases. This is like in the case of fasting [two months as expiation] for *ẓihār*, where the ruling was confined by the word "consecutively". On the other hand, concerning [fasting as expiation for forgoing the *tamattu' ḥajj* sacrifice], the ruling was qualified by 'non-consecutiveness' (*al-tafarruq*). And regarding the penance of

oath, it is made absolute. In this case, the absolute is not understood with the confinement or qualification of either cases, not the expiation for *ẓihar* nor for forgoing the animal-sacrifice of the *tamattu' ḥajj*. Instead each case should be considered as it is. This is because it is not justifiable to hold it on any of the two and not on the other.

If the confined one is not opposed by another confined law, like 'the slave' in the expiation of murdering or 'the slave' in *ẓihār*, in which the confinement in murdering is 'the faith' (*al-īmān*) while in the *ẓihār* it is absolute, then the absolute is understood in light of the confined (i.e. the confinement is carried over to the absolute).

Some of our scholars said that this [confinement or qualification] from the point of view of language because the *Qur'ān* from the beginning to the end is like one word. Some others said that it should be understood from the point of view of analogy (*al-qiyās*) and this is the most appropriate.

The Ḥanafite scholars said that the absolute should not be qualified by the confined because that would be an addition to the text and that is an abrogation by analogy. They might argue that this is because it is valid to hold what is determined by the text (*manṣūṣ*) on another determined one.

The reason why it should not be held based on the language is because the expression that mentions the confinement, i.e. [the verse regarding] murder, does not accommodate the absoluteness [as the expression that refers to] the *ẓihār*, therefore it should not be judged with the judgement as the other [expression] without a valid reason. This is like the word wheat (*burr*) since it does not accommodate the same meaning as the word rice (*al-aruzz*) it is not permissible to apply to it the rulings of rice without a reason. It is the same here.

And the reason of carrying over the qualification of the confined to the absolute that is done by analogy is because to understand the absolute in light of the confined means to specify the generality based on analogy, and it becomes like any other type of specifying the general.

[27]

CONNOTATIONS OF SPEECH (*AL-KHIṬĀB*)

The connotations of speech is of various forms:

First: The sense of speech (*faḥwā al-khiṭāb*). It is what the word indicates in the form of notification (*tanbīh*) like in the verse: *"say not to them [so much as], uff"* (*al-Isrā'*, 17:23) and the verse: *"And among the People of the Scripture is he who, if you entrust him with a great amount [of wealth], he will return it to you"* (*Āli 'Imrān*, 3:75) and the like in which the text determines the least (*al-adnā*) in order to notify the most (*al-a'lā*), and the most in order to notify the least. But, do we know what the notification indicates it from the point of view of the language or the analogy?

There are two perspectives: first, it is from the view of the language, and this is the opinion of majority of the theologians and the Ẓāhirite. Some others said that it is from direct analogy (*qiyās jaliyy*). This opinion was reported from al-Shāfi'ī and it is the most appropriate because the word grumbling (*al-ta'fif*) does not include the beating but it is indicated by its meaning and it (a harsh word) is the lesser aggression than beating, therefore, this indicates that it (the import) is an analogy.

Section

Second; the obviated speech (*lahnu al-khiṭāb*). It is omitted obvious implied meaning which the stated speech indicates, without which the meaning of the stated speech would be incomplete. This is like the verse: *"We said: Struk the rock with thy staff. Then gushed forth..."* (*al-Baqarah*, 2:60) which means: 'He strike the stone, then gushed forth...'

Another example is where the added noun in a genitive construction (*al-muḍāf*) is omitted and replaced by that which is added on to it (*al-muḍāf ilayhi*) like in the verse: *"Ask at the town"* (*Yūsuf*, 12:82), which refers to 'the people of the village'. There is no disputation that this, in its meaningfulness and explanation, is like

the expressed meaning (*al-manṭūq*), and an obvious implied meaning should not be inferred in the likes of this [example], except when occasioned.

If the speech can accommodate only one obvious inferred meaning, then, it is not permissible to add to it another, except with proper substantiation. And whenever there is contradiction between two possible obvious meanings, then infer only the meaning indicated by some proof. We narrated before such dispute concerning those who said that the obvious meaning that is most benefical should be the one inferred, or that a meaning should ony be inferred when there is difference of opinion, and we have shown the falsity of such views.

Section

The third is implicit evidence of the speech (*dalīl al-khiṭāb*).[89] This is to connect the law to one of two characteristics of a thing, from which it shows that other characteristics are its opposites. This like the verse: *"If a wicked person comes to you with any news, ascertain the truth"* (*al-Ḥujurāt*, 49:6) from which we know that for the trustworthy person it does not require ascertainment. Also like the saying of the Prophet—may Allāh honour him and grant him peace: *"For the goat that was grazed freely (sā'imah) is a charity (zakāt)"*,[90] which shows that the one which is fed (*ma'lūfah*) requires no charity. Majority of the Ḥanafite scholars, and the theologians said that it is not necessary that the states speech implies that all that which is other than it has the opposite ruling to it, rather, the ruling of what is other than it rests on separate evidences.

Abū al-'Abbās ibn Surayj said: 'If it was with the word of condition like in the verse: *"If a wicked person comes to you"* (*al-Ḥujurāt*, 49: 6), then it indicates that other than this is the opposite. But, if it was not with the word of condition, then it does not indicate that'. This is the saying of some the Ḥanafite scholars.

The proof of what we have said is that the Companions—May Allāh be pleased with him—have disputed whether it is necessary or not to do the major ablution (*al-ghusl*) for sexual intercourse with no ejaculation. Some of them said that it is not necessary[91] and they

89 It is also known as the contrast notion (*mafhūm al-mukhālafah*).

90 Narrated by al-Bukhārī (1454).

91 Narrated by Muslim (349).

argued based on the implicit evidence of the saying of the Prophet—may Allāh honour him and grant him peace: *"water is for water"*[92] which implies that since *ghusl* is obligatory by the ejaculation of water (i.e. semen), then it indicates that it is not obligatory without water (i.e. semen). However, those who obliged it said that the saying *"the water is for the water"* was abrogated and therefore it indicates what we had said above, and since to specify by the characteristic necessitates a specification of the speech, then by its absoluteness, it implies negation (*al-nafy*) and affirmation (*al-ithbāt*) like in exception (*al-istithnā'*).

Section

As for in the case where the law is connected to a limit (*ghāyah*), this indicates that [any legal matter in which the legal ruling] is [attached to] other than that limit must have a different legal ruling. Most of those who rejected the notion of the implicit evidence of stated speech support this view. Some of them said that connection to a certain limit does not indicate that what is other than that [limit] must have a different legal ruling. The proof of what we said is that if it is possible for that which comes after a limit (i.e. is stated after the limit in the speech) to be the same as that which is before it, then it would not be a limit, and this is therefore not permissible.

Section

When the law is connected to a characteristic with the word '*innamā*' (verily) like in the saying of the Prophet —may Allāh honour him and grant him peace: *"Verily all actions is due to their intentions"*[93] and his saying: *"Verily the loyalty*[94] *is for those who free the slave"*,[95] it also indicates that what is other than it, i.e. the characteristic, is the opposite of it. Many of those who rejected the notion of the implicit evidence of the stated speech also accept this.

92 Narrated by Muslim (343), al-Tirmidhī (758), Abū Dawūd (214), al-Nasā'ī (205), and Ibn Mājah (607).

93 Narrated by al-Bukhārī (1) and Muslim (1907).

94 Here, the tradition is specifically addressing the issue of who inherits the freed slave's wealth when there is no one legally qualified among the family members of the freed slave.

95 Narrated by al-Bukhārī (456) and Muslim (1504).

Some of them said that this does not indicate that what is other than something is the opposite of it. This is wrong because this word is not used except to establish that particular meaning (*al-manṭūq bihi*) and to deny all others; have you not observed that there is no difference between saying: 'Verily Zayd is in the house' and: 'There is no one in the house except Zayd', as well as between: 'Verily Allāh is the One God' and to say: 'There is no God except the One', thus, proves that it involves negation (*al-nafy*) and affirmation (*al-ithbāt*).

Section

If the law is connected to a characteristic in a genus like the saying of the Prophet—may Allāh honour him and grant him peace: *"for the goat that was grazed freely there is charity"*. This indicates that the negation of charity is only for the fed goat (*ma'lūfah*) and not to the other than this. Some of our scholars said that this would also indicate negation of the charity for other than it in all categories [of cattle on which *zakāt* is due, i.e. camels, cows, bulls, etc]. This is not true as the proof (*al-dalīl*) contrasts the expression (*al-nuṭq*); thus if the expression necessitates the obligation for the freely grazed goat (*sā'imah*), then it is necessary that the proof negates the charity from the fattened goat (*ma'lūfah*).

Section

If the law is connected merely to a name, like you say: 'On goats there is charity', this does not indicate negation of the charity for other than goats. Some of our scholars said that it indicates that (i.e. negation), just like [what was mentioned in the discussion on] the characteristic. The first opinion is the established one because it specifically mentions the name, and this name and other than it are similar. Have not you observed that they say: 'Buy a goat, a cow and a camel' where he states every single name although he intended to have them all and the characteristic is not added on to the name, for, that characteristic and all other characteristics are the same [in that the name "goat" applies to all]. Have not you seen that they do not ask: 'Buy the grazed-freely goat', as this and the fed goat are the same for them [as far as the name "goat" applies]. Thus, there is a difference between the *name* and the *characteristic* [so, legal inference (*qiyās*) cannot be made between the two and the same legal ruling cannot be applied to both].

Section

If a legal opinion which is based on the implicit evidence of a stated text leads to the negation of the stated text, the implicit evidence must be deemed invalid. This is like the saying of the Prophet—may Allāh honour him and grant him peace: *"Do not sell what you do not own"*,[96] in which the implicit evidence proves that it is permissible to sell whatever one owns, even if it is absent from the eyes (i.e., even if it is not with one currenty). However, if we make this permissible, it necessitates the permissibility of selling something that is currently not being seen [by the seller and the buyer];[97] because one does not make this distinction naturally. Thus, allowing this implicit interpretation clashes with the stated speech, that is the saying of the Prophet—may Allāh honour him and grant him peace: *"Do not sell what you do not own"*. The implicit evidence must therefore be deemed invalid so that the speech remains standing, because the argument is a branch for the speech, and it is not permissible for the branch to invalidate the root.

[96] Narrated by al-Tirmidhī (1232), al-Nasā'ī (7: 289), and Ibn Mājah (2187).

[97] It is not permissible in the legal School of the author, the Shāfi'ite School; that something be sold that is not being seen by the seller and the buyer, except in a type of sale called *salām*.

[28]

THE AMBIGUOUS (*AL-MUJMAL*) AND THE EVIDENT (*AL-MUBAYYAN*)

Aspects of the Evident (*al-Mubayyan*)

The Evident (*al-Mubayyan*) is that which is in itself independent in demonstrating the intended meaning and does not require any other in arriving at the intended meaning. It has two categories; a category which provides meaning by its expression (*nuṭq*) and a category that provides meaning by its notion (*mafhūm*). The category which provides meaning by its expression is the text (*al-naṣṣ*), the manifest (*al-ẓāhir*) and the general (*al-'umūm*). The text is every word that clearly expresses the law in a form that has no other probable meaning. It is like the verse: *"Muḥammad is the messenger of Allāh"* (*al-Fatḥ*, 48:29) and the verse: *"Do not approach adultery"* (*al-Isrā'*, 17:32), and: *"And do not kill the soul which Allāh has forbidden [to be killed] except by [legal] right"* (*al-An'ām*, 6:151) and the saying of the Prophet—may Allāh honour him and grant him peace: *"[The zakāt] for twenty four camels and less is [is given in sheep], for every five [camel] one sheep"*, and other unambiguous words explaining the laws.

Section

The manifest (*al-ẓāhir*) is every word that has two probable meanings in which it is more obvious to refer to one of them, like commands (*al-amr*) and prohibitions (*al-nahy*) and other kinds of speeches that were expressed for specific meanings but imply other probable meanings as well.

Section

The general (*al-'umūm*) is every word that encompasses two meanings and more. This is like the verse: *"then kill the polytheists"* (*al-Tawbah*, 9:5) and the verse: *"As for the thief, male or female, cut off his and her hands"* (*al-Mā'idah*, 5:38) and others. These all are of "the Evident" (*al-mubayyan*) that does not require other indications in order to

arrive at the intended meaning, but does require other indications in order to know what is *not* meant by it. All these kinds are valid for legal argumentation.

Abū Thawr and 'Īsā ibn Abān said: The general, if specified becomes ambiguous (*al-mujmal*) and therefore its literal meaning cannot be made a legal argument. Abū al-Ḥasan al-Karkhī said: If it is specified by a connected specifier (*dalīl muttaṣil*), it will not become ambiguous, but if it is specified by a disconnected specifier (*dalīl munfaṣil*), it becomes ambiguous.

Abū 'Abd Allāh al-Baṣrī said: If its ruling requires conditions like in the verse on stealing (*al-sariqah*), it is ambiguous and would not be made a legal evidence except with a proof, but if it does not require any condition, it will not become ambiguous.

The argument for what we said is that *the ambiguous* is that the meaning of which is not intelligible from its expression and requires [clarification from] other than its expression for its intended meaning to be comprehended. But, the meaning of these verses is comprehendible from their expressions and do not require others in order to arrive at their intended meanings. Thus, it is like the other verses.

Section

As for that which is comprehended through its notion (*mafhūm*), it is: sense of speech (*faḥwā al-khiṭāb*), the obviated speech (*lahna al-khiṭāb*) and the implicit evidence of stated speech (*dalīl al-khiṭāb*) and we explained them all above and need not to restate it here.

[29]

ASPECTS OF THE AMBIGUOUS (*AL-MUJMAL*)

The ambiguous (*al-mujmal*) is that which its meaning is not intelligible from its expression but requires other things in order to arrive at the intended meaning. It has several forms; one of which is when the word is used not to indicate any specific thing like in the verse: *"and give its due [zakāt] on the day of its harvest"* (*al-An'ām*: 141) and the saying of the Prophet—may Allāh honour him and grant him peace: *"I was ordered to fight the people until they confess that there is no God except Allāh. And if they confess then their their blood and wealth are protected, except if the Religion justifies otherwise"*.[98] Here, the form and amount of the right (*al-ḥaqq*) is unknown, therefore, it requires the explanation.

Section

The other form is when the word is used commonly for two different things, like the word *al-qar'* which used to mean the menstruation (*al-ḥayḍ*) as well as purity (*al-ṭuhr*), thus, it needs the explanation.

Section

The other form is when the word is used to refer to a known collective but it comes with an unknown exception like the verse: *"Lawful for you are the animals of grazing livestock except for that which is recited to you [in this Qur'ān] - hunting not being permitted while you are in the state of pilgrim sanctity"* (*al-Mā'idah*, 5:1) which is ambiguous because it comes with an exception. From this general meaning, if it is known that an aspect has been specified, but what has been specified in it is unknown, then it is also considered ambiguous since this cannot be practiced until after knowing what in it has been specified.

[98] Narrated by al-Bukhārī (1399) and Muslim (21).

Section

The other form is when the Prophet—may Allāh honour him and grant him peace—did something that has equally two probable meanings like what was narrated that *"He combined [the Prayer] while on a journey"*. This is an ambiguity, as it possibly can refer to a long or a short journey, thus, it should not be understood in reference to any of two possibilities except with evidence. Similarly, when he (the Prophet—may Allāh honour him and grant him peace) judges on a specific case and it has equally two probable situations, like what was narrated that when a man broke his fast in Ramaḍān the Prophet—may Allāh honour him and grant him peace—asked him to pay the expiation (*al-kaffārah*), it is also an ambiguity, as the man may have broken his fast by sexual intercourse (*jimā'*) or by simply eating, thus it should not be understood in reference to any of two possibilities except with evidence. All these forms are agreed upon in the [Shafi'ī] School as being ambiguities that require explanation.

Section

However, there is disagreement in the school on certain expressions. Among others is the verse: *"But Allāh has permitted trade and has forbidden interest"* (*al-Baqarah*, 2:275); it is said in one of two opinions that this is an ambiguity because the verse says: *"has forbidden interest"*, while interest (*al-ribā*) means increment (*al-ziyādah*) and indeed in every trading there must be increment, and God permits trading but prohibits interest. Thus, this needs an explanation of what is permissible and what is prohibited. While in the second opinion, it said that this is not an ambiguity, and this is most appropriate, because *trading* is linguistically understood and therefore is interpreted in its generality. What was proven to be an exception is then exempted.

Section

Among others are verses that mention legal terms, like in the verse: *"And establish prayer and give zakāt"* (*al-Baqarah*, 2:43), and *"So whoever sights [the new moon of] the month, let him fast it"* (*al-Baqarah*, 2:185), and *"And [due] to Allāh from the people is a pilgrimage to the House"* (*Āli 'Imrān*, 3:97). Some of our scholars said that they are all generalities and not ambiguities; thus, the prayer (*al-ṣalāt*) is applied to all

invocation of God (*du'ā'*), the fasting (*al-ṣawm*) is applied to all kinds of restraint (*imsāk*) and the pilgrimage (*al-ḥajj*) is applied to all physical pursuits (*al-qaṣd*), except when there is evidence proving otherwise. This is the approach of those who claimed that no terms has been shifted from linguistic to legal meaning, [i.e. all terms maintain their original linguistic meaning]. Some others said these are all ambiguities since the meanings of those terms vary and linguistically the expression does not reveal them. Instead, the intended meanings are known from the religion, therefore they need clarification. This is like the verse: *"and give its due [zakāt] on the day of its harvest"* (*al-An'ām*, 6:141). This is the approach of those who say that these terms are all transmitted. And this is the sounder position.

Section

Among others is the words in which permission (*al-taḥlīl*) and forbiddance (*al-taḥrīm*) is connected to specific things (*a'yān*) like the verse: *"Prohibited for you are dead animals"* (*al-Mā'idah*, 5:3). Some of our scholars said that it is an ambiguity because things cannot be described as being permissible and prohibited. What is described as such is our actions, but our actions were not mentioned [in the verse], therefore it requires an explanation of which action is prohibited and which is not.

Some of them said that it is not an ambiguity. This is the sounder because the permission and the forbiddance in such examples, whenever they are stated, it is understood linguistically to refer to the intended actions. Don't you see when someone says to another: 'I forbid you this food', it is understood that this forbiddance is on eating. Thus, anything which the meaning is understood from its word is not an ambiguity.

Section

Similarly, they are disagreed on expressions that contain both negation and affirmation like the saying of the Prophet—may Allāh honour him and grant him peace: *"Indeed, all actions are based on the intentions"*, and his saying: *"There is no marriage without a legal guardian"*, and the likes. Some of them said that this is an ambiguity because what were negated were the actions and the marriage, but they exist, thus, necessarily, the intended meaning here is actually the

negation of an unmentioned characteristic. Therefore, it requires clarification for that particular characteristic.

Some of them said that this is not an ambiguity and this is the most correct, because the law giver does not negate or affirm visible things (*al-mushāhadat*) but he negates and affirms the lawfulness of it; as if it says: 'There is no lawful action without an intention' and 'No lawful marriage except with a legal guardian' and all these are understandable from the expression, and therefore, it is not possible that it be an ambiguity.

Section

They are also disagreed on the saying of the Prophet—may Allāh honour him and grant him peace: *"My people are forgiven for their mistakes and forgetfulness and what they were compelled into doing"*.[99] Some of them said that this is an ambiguity because what is forgiven are their mistakes but they exist, thus, necessarily, the intended meaning of this is other than what is stated. Therefore, it needs clarification.

Some others said that it is not an ambiguity and this is the sounder opinion, since its meaning is linguistically comprehendible. Don't you see that when someone says to his slave: 'You are forgiven of your crime', you will understand from this that the blame which follows and everything related to the crime is what is forgiven. This indicates that it is not an ambiguity.

Section

As for the obscure (*al-mutashābih*), our scholars are in disagreement on it; some of them said that it resembles the ambiguous while some others said that the obscure is what God has made exclusive for His Knowledge and none among His creation could perceive it. Some people said that the Obscure is: stories (*al-qaṣaṣ*), metaphors (*al-amthāl*), maxims (*al-ḥikam*), the lawful (*al-ḥalāl*) and the unlawful (*al-ḥarām*). Some others said that it refers to the broken letters at the beginning of the chapter of the *Qur'ān* like *alif-lām-mīm-ṣād*, *alif-lām-mīm-rā'*, *alif-lām-rā'*, *alif-lām-mīm* and others. The right one is the first opinion because the reality of *the Obscure* is that the meaning of which is unclear (due to it outwardly resembling other words ane

[99] See *Kashf al-Khafā'* (1:522).

meanings), while all what they have mentioned cannot be thus described.

[30]

CLARIFICATION (*AL-BAYĀN*) AND ITS FORMS

The clarification (*al-bayān*) is the proof that, when properly examined, will lead to that which the evidence proves. Some of our scholars said that it is to bring something out from a state of obscurity into a state of clarity.

Section

The clarification occurs through sayings (*al-qawl*), notions of sayings (*mafhūm al-qawl*), actions (*al-fi'l*), admissions (*al-iqrār*), indications (*al-ishārāt*), writings (*al-kitābah*) and analogies (*al-qiyās*).

Clarification by sayings is like the saying of the Prophet—may Allāh honour him and grant him peace: *"For silver (al-riqqah) [the charity] is a quarter of one tenth (rubʿ al-ʿushur)"*.[100] And his saying: *"For five camels [the charity] is a sheep"*.

Clarification by notion may be in the form of cautioning like the verse: *"say not to them [so much as] 'uff'"* (*al-Isrā'*, 17:23) in which it cautions that the interdiction of beating is therefore prior [in prohibition]. It may also be an implicit legal proof, like in the saying of the Prophet—may Allāh honour him and grant him peace: *"for the goat that was grazed freely there is a charity"* in which there is implicit proof for the exception of charity (*zakāt*) for the fattened goat.

As for that by actions, it is like a clarification of the appointed times of the prayers and of its practices, and of the pilgrimage and its rituals, based on the practice of the Prophet —may Allāh honour him and grant him peace.

As for that by admissions, it is like what was narrated that "he saw Qays performing a two *rakaʿat* prayer after the dawn prayer and he asked him and he answered: 'Two *rakaʿat* of the dawn prayer', and he did not object to it". This indicates that it is permissible to perform the voluntary prayer after the Dawn Prayer.

[100] *Al-Riqqah* literally means thinness. It was used to refer to all kind of silver.

As for that by indications, it is like the Prophet—may Allāh honour him and grant him peace—says: *"The month is like this and like this..."*[101] and he pulled back and folded in his thumb on the third.

And that by writings is like when he explained the religious duty of charity and other laws in different materials that he wrote. And that by analogy is like when the text states four things concerning interest (*al-ribā*)[102] but by analogy, it shows that other than that of foods (*al-maṭʿūmāt*) is also the same.

[101] Narrated by al-Bukhārī (1908) and Muslim (1080).

[102] As in the hadīth of Abū Hurayrah narrated by Muslim (1588).

[31]

DELAYING THE CLARIFICATION

The clarification cannot be delayed beyond the needed time because it is not possible to obey the command without clarity of its meaning. As for delaying it from the time of speech, there are three opinions: The first: It is permissible and this is the opinion of Abū al-ʿAbbās, Abū Saʿīd al-Iṣṭakhrī and Abū Bakr al-Qaffāl. The second opinion: It is not permissible and this is the opinion of Abū Bakr al-Ṣayrafī, Abū Isḥāq al-Marwazī and it is the opinion of the Muʿtazilite. The third: It is permissible to delay the explanation of the ambiguious but not to delay the explanation of the general and this is the opinion of Abū al-Ḥasan al-Karkhī.

Some scholars said that the delay is permissible for reports (*al-akhbār*) but not for commands (*al-amr*) and prohibitions (*al-nahy*), while others said that it is permissible for commands and prohibitions but not for reports. The sound one is it is permissible in all situations we stated because the delay does not affect the obedience. Thus, it is permissible like the delaying of the clarification in the case of abrogation.

[32]

ABROGATION (AN EXPLANATION OF ABROGATION (*AL-NASKH*) AND DISCLOSURE (*AL-BADA'*)

The word abrogation (*al-naskh*) in Arabic is used for lifting (*al-raf'*) and removal (*al-izālah*); it said: *nasakhat al-shams al-zillah* (The sun abrogated the darkness) to mean 'the sun removed the darkness', and *nasakhat al-riyāh al-athār* (The wind abrogated the traces), meaning 'the wind removed the traces'. It also means copying; it is said: *nasakhtu al-kitāb* (I abrogate the book) when I copied what is in it, although nothing was removed from its place.

The word, in the religious conception, is used to refer to only the first linguistic meaning, namely; removal. Its definition is: the speech that indicates the removal of a ruling of sacred law which was established by a previous speech, in the sense that without it, the previous ruling will remain; and it comes later than the previous speech. The removal of law from the person due to death does not fall within this definition because that is not an abrogation, since it was not [removed] by [later] speech; neither to what was lifted from what they used to do before [Islam] like drinking wine and others as this is not an abrogation because those practices were not established by [Divine] speech; nor to what was dropped by a connected expression like exceptions (*al-istithnā'*) and limits (*al-ghāyah*) for instance the verse: *"Then, complete the fast until sunset"* (*al-Baqarah*, 2:187). This is not an abrogation because it does not come later than the previous speech.

The Mu'tazilite defines it as: the speech that indicates that a practice of the law established by the abrogated [source] is not valid in the future in a sense that without the speech the law will remain based on the first text. This is incorrect because if it is defined like this, then, the abrogator (*al-nāsikh*) is not eliminating what was established by the first speech; because a practice of the law established by the abrogated (*al-mansūkh*) remains until it is eliminated by the abrogator. We explained that abrogation lexically is the removal and the lifting.

Secsion

Abrogation is possible in Islamic law. A group of the Jews claim that it is not possible and a small group of Muslims also say the same. This is not right because the commandment of God, for some people, is for Him to decide, He does whatever He wishes. And for the others, they assert that the commandment is due to the welfare of man. Thus, if it is due to His Will, then it is possible that He wishes to command an obligation at one time and to eliminate it at another time; and if it is due to the welfare [of man], then it is possible that at one time the welfare is with an order and at another time it is with another [commandment]. Thus, there is no basis to deny this.

Secsion

The disclosure (*al-bada'*) is when something which was hidden becomes disclosed. Linguistically it is said: *bada lil-fajr* (the dawn was disclosed to me), when it appears to him. This is not possible in Islamic law (*al-shar'*). Some of the Shī'ite Rāfiḍah said that the disclosure is possible to Allāh the Almighty.[103] Among them is Zurarah ibn A'yān[104] in his poetry:

If not because of the *disclosure*, I will name him without fear
For he who is inconstant, to mention the *disclosure* is an attribute
If not because of the *disclosure*, he would have no ability to dispose
He would be like a fire blazing, burning its time away
But he is by nature a gleaming light
But by God, the talk of natures is undesireable[105]

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[103] Meaning, that, in their view, it is possible for Allāh to be the recipient of *disclosure*.

[104] He Zurarah ibn A'yān al-Shaybānī, Abū al-Ḥasan, the leader of the group called al-Zurariyyah, among the extreme group of the Shi'ite. He is a theologian and poet from Kūfah. He wrote books, one of which, is *Kitāb al-Istiṭā'ah wal-Jabr*. He died in 150 H.

[105] This is a poem in which he soaks about the expected *mahdī*. The poem reads: *wa-lawlā al-badā sammaytuhu ghayr hā'ib*
wa-dhikr al-badā na't li-man yataqallab
wa-lawlā al-badā mā kāna fihi taṣarruf
wa-kāna ka-nāri dahrihā tatalahhabu
wa-kāna ka-ḍaw'in mushriqin bi-ṭabī'at
wa-bil-Lāhi 'an dhikr al-ṭabā'i' yurghabu

Some of them claim that the disclosure is possible to Allāh the Almighty concerning something which the creation has not before perceived. This is not true, because if they mean by disclosure what we explained, that something is disclosed to Allāh the Almighty after it was hidden from Him, this is infidelity, and Allāh the Almighty is the most Exalted of that. But, if they mean by it an alteration of the acts of devotion and of religious duties, then we do not deny this as this is not called disclosure because the real meaning of disclosure is what we explained before. Thus, such a view is utterly baseless.

Secsion

As for the abrogation of a ruling before its time of implementation, it is permissible to abrogate the action before its time comes and this is not disclosure. Some of our scholars said that it is not permissible, and this is the opinion of the Mu'tazilite, as they think that this is disclosure. The proof that this is permissible is when Allāh the Almighty ordered the Prophet Ibrāhīm—May Allāh grant him peace—to sacrifice his son, He then abrogated that before the time came. This shows that this is permissible. And the proof that this was not a disclosure is—what we explained—that the disclosure is to disclose what was hidden from Him and there is nothing of this meaning in the abrogation before its time.

[33]

WHAT COULD BE ABROGATED OF THE LAW AND WHAT CANNOT

Abrogation is not permissible except in something that is possible to have two equal possibilities like the fasting, the prayer and other religious acts of devotion. Whereas in the case where there is only one possible situation like the notion of Unity (*al-tawḥīd*) and the Attributes of the Essence like Knowledge, Power and others, these cannot be abrogated. The same applies to what Allāh had reported regarding the stories of the past generations and the earlier nations, this also cannot be abrogated. Also what Allāh reported regarding things that are going to take place in the future like the coming of *Dajjāl* and others, it cannot be abrogated. Abū Bakr al-Daqqāq is reported to have said that whatever command was stated in the form of a report like the verse: *"Divorced women remain in waiting for three periods"* (*al-Baqarah*: 2:228) cannot be abrogated. Some people said that abrogation is permissible on reports (*al-akhbār*) as it is permissible on orders (*al-amr*) and prohibition (*al-nahy*). The argument against al-Daqqāq is that the verse: *"Divorced women remain in waiting"*, although its expression is an expression of report, it is in fact a command. Have you not observed that it is possible [in this case] that there be a contrast of it, thus, if it is actually a report then it would not be possible for it to be contrasted. Thus, when it is established that this is a command, then to abrogate, it is permissible like all other forms of commands. And the argument against the earlier opinion is that if we permit abrogation on reports then one of the two reports becomes a lie, and this is not possible.

Section

Similarly it is not permissible to abrogate a consensus (*al-ijmā'*) because consensus occurs only after the death of the Prophet—may Allāh honour him and grant him peace—while abrogation is not possible after his death.

Section

It is not permissible to abrogate [a ruling that is based on] analogy (*al-qiyās*) because the analogy follows from the primary sources and since the primary sources are established, it is not permissible to abrogate what follow therefrom. However, when the law on a certain thing is established based on a [the same] juristic determinant [as another], then, an analogy is made on this [law] for another law, but later, the law of that particular thing is abrogated. Consequently, the law that was analogically established on the branch [issue] becomes invalid. Some of our scholars said that this does not invalidate the law and it is the opinion of Ḥanafīte scholars. This is not true because the branch follows the root, so when the ruling of the root is invalidated, then, the ruling at the branch is also invalidated.

[34]

FORMS OF THE ABROGATION

The abrogation is permissible on something which is possible to occur. It is permissible on the form (*al-rasm*) but not on the law (*al-ḥukm*) like the verse on stoning (*al-rajm*): *"The old man and woman if they commit adultery, stone them as an exemplary punishment from Allāh and indeed Allāh is the Exalted in Might, the Wise"*.[106] This verse has been abrogated in form but the law remains.

Also abrogation of a ruling but not its text is permissible, like in the case of *'iddah*[107] which was a year and then it was abrogated and became four months and ten days, but its text remains, that is in the verse: *"for their wives is a bequest: maintenance for one year without turning [them] out"* (*al-Baqarah*, 2:240).

Abrogation of both the text and its ruling is also permissible, like the number of suckling (*raḍā'at*) that will render milk-siblings prohibited from [marrying] each other. It was by breast-feeding ten times. And this is what was recited, then, both the text and the ruling were abrogated.[108]

A group of scholars asserted that it is not permissible to abrogate the ruling and maintain the reading because this means that the proof remains but not what is proven by it. Another group claims that it is not permissible to abrogate the reading but maintain the law because the law is a branch of the reading, thus it is not permissible to lift the root and maintain the branch. This is not true because the reading and the ruling are actually like two rulings, therefore it is permissible to lift one of them and maintain the other, like you say about two acts of worship; it is permissible to abrogate one of them and maintain the other.

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106 See on this verse, the *ḥadīth* narrated by al-Tirmidhī (1431), Ibn Mājah (2553), al-Shāfi'ī (1:163) and Ibn Ḥibbān (4428).

107 *'Iddah* literally means number. Legally, it refers to the waiting period following dissolution of marriage by death or divorce.

108 See on this the *ḥadīth* narrated by 'Ā'ishah—may Allāh be pleased with her—in Muslim (1452) and Ibn Ḥibbān (4222).

Section

Abrogation is permissible of something without a replacement, like in the case of *'iddah* in which any excess of four months and ten days was abrogated without any replacement.

It is also permissible with replacement, like the abrogation of the direction of *qiblah* from Jerusalem to Makkah. Also, the abrogation is permissible for something lighter than the abrogated, like abrogating perseverance in fighting the enemies, from one soldier against ten to one soldier against two; as it is also permissible for something which is greater than the abrogated like fasting, before it was a choice between fasting and not, but then it was abrogated to become determined with the verse: *"So whoever sights [the new moon of] the month, let him fast it"* (*al-Baqarah*, 2:185).

The abrogation is permissible from prohibition to the permission like the verse: *"Allāh knows that you used to deceive yourselves, so He accepted your repentance and forgave you. So now, have relations with them and seek that which Allāh has decreed for you. And eat and drink until the white thread of dawn becomes distinct to you from the black thread [of night]"* (*al-Baqarah*, 2:187), in which sexual intercourse was prohibited but then was permitted for them.

Some of our scholars said that abrogation is not permissible for something greater (i.e. more difficult) then the abrogated and this is the opinion of the Ẓāhirite (*ahl al-ẓāhir*); and it is not true because we find that it has occurred in Sacred law, that is, the abrogation of the choice between fasting and not fasting by the obligatoriness of fasting. Also, as it is permissible to make compulsory something which was never before compulsory is a difficulty, then to permit the abrogation of something compulsory with something more difficult than the abrogated is prior.

[35]

THAT WITH WHICH ABROGATION IS AND IS NOT PERMISSIBLE

It is permissible to abrogate the *Qur'ān* with the *Qur'ān* based on the verse: *"None of Our revelations do We abrogate or cause to be forgotten, but We substitute something better or similar"* (*al-Baqarah*, 2:106).

Section

Similarly, it is permissible to abrogate the Prophetic tradition (*al-Sunnah*) with the Prophetic tradition, as it is permissible to abrogate the *Qur'ān* with the *Qur'ān*, the *āḥād* with the *āḥād*, the *tawātur* with the *tawātur*, and the *āḥād* with the *tawātur*. As for abrogating the *tawātur* with the *āḥād*, it is not permissible because the *tawātur* necessitates certain knowledge and it is not permissible to abrogate it with something that necessitates mere assumption (*al-ẓann*).

Section

It is also permissible to abrogate actions with action as it is resemble to abrogate sayings with sayings. Similarly, it is permissible to abrogate sayings with actions and actions with sayings. Some said that it is not permissible to abrogate sayings with actions. The evidence on its permissibility is that as far as clarification (*al-bayān*) is concerned, an action is like a saying, thus as it is permissible with sayings, it is also permissible with actions.

Section

As for abrogating the *Sunnah* with the *Qur'ān* there are two opinions:

First: It is not permissible because Allāh the Almighty made the *Sunnah* as an explanation for the *Qur'ān*, He says: *"that you may make clear to the people what was sent down to them"* (*al-Naḥl*, 16:44). If we permit abrogating the *Sunnah* with the *Qur'ān*, then we are making the *Qur'ān* as a clarification for the *Sunnah*.

Second: It is permissible, and this is the right one because the *Qur'ān* is superior to the *Sunnah*, and since it is permissible to abrogate the *Sunnah* with the *Sunnah*, then it is prior to abrogate it with the *Qur'ān*.

Section

As for abrogating the *Qur'ān* with the *Sunnah*, it is not permissible from the point of view of revelation (*al-sam'*). Some of our scholars said that it is not permissible either from the point of view of revelation, or from the point of view of reason. The first opinion is sounder. The Ḥanafīte scholars claim that it is permissible based by a *mutawātir* report, and this is the opinion of most theologians; and this view has also been reported from Abū 'Abbās ibn Surayj.

The proof on the permissibility of this [abrogation] from the point of view of the reason is the fact that there is rationally nothing to deny its permissibility. [On the other hand], the proof that this abrogation is not permissible from the point of view of revelation is the verse: *"None of Our revelations do We abrogate or cause to be forgotten, but We substitute something better or similar"* (*al-Baqarah*, 2:106). And, the Sunnah is not like the *Qur'ān*, as you can see that reciting the Sunnah is not rewarded as the recitation of the *Qur'ān* is rewarded, and the words of the *Sunnah* is not considered as being inherently miraclulous as it is with the words of the *Qur'ān*. This shows that the *Sunnah* is not the same as the *Qur'ān*.

Section

As for abrogation with consensus (*al-ijmā'*), it is not permissible because consensus occurs after the death of the Prophet—may Allāh honour him and grant him peace, thus, it is not permissible to abrogate what was established in his laws. However, the validity of *abrogation* has been evidences by consensus, and the nation will not consent on something wrong; thus, when we see the nation consenting on something opposed to what was state by the religious law (*al-shar'*), that indicates to us that it was abrogated (*mansūkh*).

Section

Abrogation is permissible with the implicit evidence of stated speech (*dalīl al-khiṭāb*) since it is within the notion of expression (*al-nuṭq*),

according to the soundest position of the school. Some of our scholars consider it like the analogy and based on this *abrogation* is not permissible by it. The former opinion is sounder. As for the abrogation with the sense the speech (*faḥwā al-khiṭāb*)—that is notification (*al-tanbīh*)—it is not permissible because it is actually an analogy. Some of our scholars said that it is permissible to abrogate with it because it is like the expression.

Section

The abrogation is not permissible with analogy. Some of our scholars said that it is permissible with the obvious (*al-jaliy*) among the analogies but not with the concealed (*al-khafiy*) ones. Some people said that it is permissible with all argument with which clarification (*al-bayān*) and specification (*al-takhṣīṣ*) occur. This is not true because the analogy is only valid when it is not contradicted by any text. But when there is a text contradicting the analogy, the analogy is bereft of legal authority, and therefore, the abrogation with it is not permissible.

Section

The abrogation is not permissible with rational arguments because rational arguments are of two kinds: a kind which the Revealed Law cannot possibly contradict, thus, it is not imaginable that the religious law be abrogated by it; and the other kind is that which the Revealed Law could possibly contradict. And that is maintining of the unaffected (original) ruling.[109] This is because the initial unaffected ruling should be implemented as long as there is no [specific] legal ruling, but when there is a specific legal ruling, then the original notion is invalid, thus the abrogation by this type of rational argument is not possible.

[109] The origional or unaffected ruling is to maintain the ruling of a general class to which a particular belongs unless that particular has been proven to have a different ruling; or to maintain the initial permissibility of things, except foods and sexual relations, unless proven otherwise.

[36]

KNOWING WHAT DIFFERENTIATES BETWEEN THE ABROGATOR (*AL-NĀSIKH*) AND THE ABROGATED (*AL-MANSŪKH*)

Indeed abrogation is known by clear statements like in the verse: *"Now, Allāh has lightened [the hardship] for you"* (*al-Anfāl*, 8:66). It is also known by consensus, where the nation consent on something that contrasts what has been stated by a report, thus it proves that it was abrogated[110] because the nation cannot consent on a mistake. Sometimes, an abrogation is known when one statement comes after another, contradicting it. This is like what was reported that the Prophet—may Allāh honour him and grant him peace—said: *"The adulterer with the adulteress —100 lashes and stoning"*,[111] and then, it was narrated that *"he stoned Mā'iz and did not lash him"*.[112] Thus, it shows that the lashing was abrogated.

Section

The later of the reports is known from the statement itself like the saying of the Prophet—may Allāh honour him and grant him peace: *"I prohibited you from visiting the graves but do visit them"*.[113] Also, it is known from a report of a Companion that this [verse] was revealed after this [one], or this [saying] was stated after this [one], as reported: "Indeed, the last of the two things from the Prophet—may Allāh honour him and grant him peace—is not to make the ablution after eating meat that fire directly touched".[114]

When the narrator of one of the two reports is earlier in Companionship while the other is later in Companionship, like Ibn

110 In the Cairo edition, it stated *mansūb* (p. 75), but this is not understandable. The text in Dimashq edition as well as in *Sharḥ al-Luma'* mentions *mansūkh*, which is more appropriate here (p. 516).

111 Narrated by Muslim (1690), Abū Dāwūd (4415), and al-Tirmidhī (1434).

112 Narrated by al-Bukhārī (6438) and Muslim (1695).

113 Narrated by Muslim (977), al-Nasā'ī (4:89), and Ibn Mājah (1571).

114 Narrated by Abū Dāwūd (192), al-Nasā'ī (1:108), al-Bayhaqī (188), and Ibn Ḥibbān (1134).

Mas'ūd and Ibn 'Abbās—may Allāh be pleased with him—, it is not permissible to abrogate the report of the earlier with the report of the later. This is because both of them lived until the Prophet—may Allāh honour him and grant him peace—passed away and it is possible that the earlier one in Companionship heard what he narrated after the hearing of the later. Also, it is possible that the later companion was narrating from someone who is earlier in his companionship and therefore his report is not actually later then the report of the earlier. Thus, with this probability, the abrogation is not permissible.

Section

If the narrator of one of the two reports became Muslim after the death of the other, or after the story he reported, like Talq ibn 'Alī reported 'that the Prophet—may Allāh honour him and grant him peace—was asked about touching the penis, while he is building the Mosque of Madīnah, he did not make it obligatory the ablution for that'.[115] However, Abū Hurayrah reported from the Prophet—may Allāh honour him and grant him peace—that he made obligatory the ablution',[116] and he became Muslim in the year of Khaybar, after the Mosque was built. Thus, there is a probability that the report by Talq was abrogated by his report, because, most likely, he did not hear what he narrated except after this story, so his narration abrogated this narration. There is also the probability that it does not abrogate it, for it is possible that he heard the report before he became a Muslim, or he was narrating it from someone who became Muslim before him.

Section

But, if a Companion said: 'This verse was abrogated', or 'This report was abrogated', this is not accepted from him until he makes clear what is the abrogator (*al-nāsikh*), then that is examined. Some people say: It is abrogated due to his report and he is ought to be followed in that. Some others say: If he mentioned the abrogator, then do not

115 Narrated by Abū Dāwūd (182), al-Tirmidhī (58), al-Nasā'ī (1:110), Ibn Ḥibbān (1122), and Ibn Mājah (483).

116 See the ḥadīth by Abū Hurayrah in Ibn Ḥibbān (1118), al-Shāfi'ī in *al-Umm* (1:19), Aḥmad (2:333), al-Dāraquṭnī (1:147), al-Bayhaqī in his *al-Sunan al-Kubrā* (2:131-132), and al-Ḥākim (1:138).

imitate that but examine it, but if he did not mention the abrogator, then it is abrogated and accepted by imitation. The argument that this should not be accepted is that it is possible that he thought it was abrogated due to something which actually does not necessitate abrogation, and it is not permissible to ignore an established law without proper reflection.

[37]

ON THE ABROGATION AND THE ADDITION OF PART OF A WORSHIP (*AL-'IBĀDAH*)

If a part related to an act of worship is abrogated of it, this will not be considered as an abrogation of the worship [as a whole]. Some people say that this is an abrogation for the worship. While some people say that if this involves a part of the worship like bowing (*al-rukū'*) and prostrating (*al-sujūd*) in the prayer, then, it is considered as an abrogation for the prayer, but if it involves something separate from the prayer like purification (*al-ṭahārah*), then, it is not an abrogation for the prayer. Some theologians said, if it is of something without which the worship will not be valid, i.e. before the abrogation, then it is an abrogation for the worship, whether it was a part of the worship or something separate from it. But, if it is of something without which the worship will be valid, i.e. before the abrogation, like to stand on the right side of the *imām* and to recite the prayer of *tawajjuh* and the likes, then, it is not an abrogation for the worship.

The evidence that it is not an abrogation is that the remaining parts are yet as they were and nothing changed, thus it is not permissible to be made abrogated, as if fasting and prayer were ordered and then one of the two was abrogated.

Section

When something is added to the worship, it is not an abrogation. The scholars of Iraq said that if the addition necessitates a specific ruling in it, like obligating intention in ablution and relocating the fornicator from his locality for one year as part of his legal penalty (*al-taghrīb fī al-ḥadd*), then it is an abrogation. And if it is in the text of the *Qur'ān*, then it is not permissible [to be abrogated] by a solitarily transmitted report (*khabar al-wāḥid*) or by analogy (*al-qiyās*). Some theologians said that if the addition is a condition (*sharṭ*) for the ruling to which it is added, like an additional *raka'at* in the prayer, then it is an abrogation. But, if it is not a condition for the ruling to which it is added, then, it is not an abrogation. The argument for what we said is that abrogation is lifting (*al-raf'*) and removal (*al-*

izālah) but this does not lift or remove anything, therefore, it is not an abrogation.

[38]

THE LAW OF ANCIENT PEOPLE BEFORE US (*SHAR' MAN QABLANĀ*) AND WHAT IS CONFIRMED IN THE LAW BUT IS NOT CONNECTED TO THE COMMUNITY

Our [Shāfi'ite] colleagues have three different opinions concerning the law of the ancient people who lived before our times. Some of them say that the ancient law is not for us, while others hold that it is binding on us, except what is abrogated thereof. Still, there are others who maintain that only the law of Prophet Ibrāhīm—may Allāh grant him peace—applies to us, and not that of other [Prophets], whereas some scholars assert that the law of Prophet Mūsā—may Allāh grant him peace—is applicable to us except those of it which have been nullified by the law of Prophet 'Īsā—may Allāh grant him peace. Some even declare that only the law of Prophet 'Īsā—may Allāh grant him peace—is binding to us. The opinion which I used to maintain in *al-Tabṣirah*[117] is that all ancient laws still apply to us except what is abrogated thereof. But, the correct view which I hold now is that none of it is meant for us. This is supported by the fact that neither the Prophet—may Allāh honour him and grant him peace—nor anyone of his Companions has ever referred to the books of ancient in matters of law, and not even to any statement of those who later became Muslims among them; for if the ancient law were still binding on us, they would have searched for it and referred to it; but, the fact they did not do so shows that what we have just stated is correct.[118]

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[117] i.e. al-Shīrāzī, *al-Tabṣirah*, ed. Muḥammad Ḥasan Hītū (Dimashq: Dār al-Fikr, 1980).

[118] Scholars generally agree on the permissibility of quoting from or referring to the ancient people as indicated in the ḥadīth: *ḥaddithū 'an banī Isrā'īl wa-lā ḥaraj*, as long as it does not contradict the *Qur'ān* and the *Sunnah*.

Section

That which is stated in the law or revealed to the Prophet—may Allāh honour him and grant him peace—does not relate to the Muslim community, such as legislation on some new issues, or abrogation of something they used to practice formerly; is it also applicable in the case of the Muslim community? There are two opinions on this issue. Some of our colleagues say that it [i.e. the ancient law] does apply to the Muslim community, so that if it pertains to ritual, then, it must be compensated. Yet, there are among them who say it is not necessary to do so, which is the correct view, because the direction of prayer was shifted towards *Ka'bah* while the people of Qubā' were facing *Bayt al-Maqdīs* and they were told to turn in the middle of the prayer and they changed their direction without having to repeat the prayer. For, if it was necessary for them to perform what they had missed, they would have been told to repeat the prayer.

[39]

SEMANTIC PARTICLES

You should know that this discussion belongs to grammar, but since jurists too are very much in need of it, legal scholars include it [in their discourse]. I am now delineating the most common ones –with God's help and confidence in Him.

Section

One of those particles is *man* (مَنْ meaning: who, anyone, anybody, whosoever) which is used in interrogative, conditional-retributive and informative sentences. Here are some examples of its use; in the interrogative (*al-istifhām*): Who is with you? Who visited you? In the conditional-retributive (*al-sharṭ wal-jazā'*): Whosoever comes to me, I shall honour him, but whosoever disobeys me, I shall punish him; in the informative (*al-khabar*): Someone whom I love has come to me. This particle is used for humans only.

Section

The particle *ayyu* (أيُّ meaning: which, what kind of) is used in interrogative, conditional-retributive and informative sentences as well. You say in the interrogative, for example, which/what kind of thing are you good at? Which/what kind of thing do you have? In conditional and retributive sentences, you say: If any man/whosoever comes to me, I shall honour him. In informative sentence: If any of them/whoever among them stands up, I shall beat him. This particle is used for humans as well as non-humans.

Section

The particle *mā* (مَا meaning: not, what) is used to express negation, astonishment and question. In negation (*al-nafy*), you say: I did not see Zayd. In astonishment (*al-ta'ajjub*), you say: What a handsome man Zayd is! In asking a question (*al-istifhām*): What is with you? This particle is used in interrogative sentence for non-humans, though

some people say it is used also for humans, such as in the *Qur'ān*: *"By the sky and the one who set it up"* (*al-Shams*, 91:5).

Section

The particle *min* (مِنْ meaning: from, of) is used to express the beginning of an end (*ibtidā' al-ghāyah*), as well as to signify partition (*al-tab'īḍ*) and connection (*al-ṣilah*). You say in the beginning of an end, for example: I walked from Baṣrah; a letter has come from him. For partition, you say: Take some of these dirhams; I acquired some of his knowledge. To express connection, you say: Not even one [of them] has come to me; ... and not even one [of them] is at home [in the quaters].

Section

The particle *ilā* (إلى meaning: to, until) is used to denote arrival at the final or terminal point (*intihā' al-ghāyah*), as when one says: I travelled to Zayd, though it is also sometimes used in the sense of 'together' or 'along with' (*ma'a:* مَعَ) provided that there is an indication such as in the *Qur'ān* (5:6): *"[And wash your] hands and your elbows"*, where the preposition *ilā* means 'together with'. Some scholars who follow Abū Ḥanīfah even hold that it is used in that sense truly [rather than metaphorically], but this is mistaken because there is no disagreement over the fact that if a person says, "I have to pay money in dirham up to ten", he is not obliged to [hand over] the tenth dirham. Similarly, if he says to his wife, "You are divorced from one to three [times]". This does not entail the third time, so, it signifies limit.

Section

The particle *wāw* (وَ meaning: and) is used to express combination (*al-jam'*) and sharing (*al-tashrīk*) when used as a conjunction (*al-'aṭf*). Some of our [Shāfi'ite] colleagues say that it is also used to denote sequence or order (*al-tartīb*), but this is a mistaken view because if it were so, then it would not be possible to employ a word denoting combination, as when you say: Both Zayd and 'Amr have come to me together, as it is not possible for you to say: Zayd came to me, then 'Amr together. Further, the particle *wāw* could also mean 'possibly' (*rubba*), occurring in the beginning of sentence such as: *"wa-mahmahin mughabbaratin arjā'uhu* (meaning: many a desert is full of dust in all regions)," that is to say: *rubba mahmahin*. Still, in oath, the particle *wāw* is used as a substitute for *bā'*. Thus, you say: He did visit me, [I swear] by God (*wal-Lāhi*) in the sense of *bil-Lāhi*.

Section

The particle *fā'* (فَ meaning: so, then, thus, hence, for, because) is used to express sequence and arrangement (*al-ta'qīb wal-tartīb*). You say: Zayd came to me, and then 'Amr, which means: 'Amr came to me too, after Zayd'. Another example: If you go to the market, then buy such and such thing –that is to say, after your arrival there.

Section

The particle *thumma* (ثُمَّ meaning: then, thereupon, furthermore, and again, moreover) is also used to express sequence albeit not in a strict sense and with some delay (*ma'a al-muhmalah wal-tarākhī*). You say: Zayd came to me, and thereafter 'Amr –which implies some temporal gap in between.

Section

The particle *am* (أَمْ meaning: or) is used in the interrogative, as you say: Did you talk or not? But it is also used in the sense of *aw* (أَوْ). For example, you say: It is the same whether you did well or you did not.

Section

The particle *aw* (أَوْ meaning: or, rather) is used to express doubt (*al-shakk*) in the statement. You say: Zayd talked to me, or rather 'Amr. It is also used to express a range of alternatives, such as in the Qur'ānic verse: *"[... is] either feeding the poor"* (*al-Mā'idah*, 5:89). Some scholars say: In prohibitive sentences the particle *aw* is used for combination. But the first view is the correct one, because prohibition is a command to abandon an action, just as imperative is a command to perform an action. Therefore, if it does not necessitate combination in imperative, then, it cannot necessitate combination in prohibition.

Section

The particles *idh* (إذ) [meaning: and, then (introducing a verbal clause); as, when (temporal conjunctive); since, as; the more so as, because (causal conjunctive)] and *idhā* (إذا) [meaning: and then, and all of a sudden (introducing a nominal clause); when; if, whenever; whether (introducing indirect question)] are particles expressing time [of action], with *idh* reserved for what happened in the past. For instance, you say [to your wife]: You are divorced when you entered the house –indicating past event. The particle *idhā* is used for the future, as you say: If you enter the house, you will be divorced— indicating future conditional.

Section

The preposition *bā'* (ب) [meaning: with, by, in, at] is used to indicate connection (*al-ilṣāq*). For example, you say: I passed by Zayd, and I wrote with a pen. It is also used to express partition, like your saying: I rubbed part of my head. According to the disciples of Abū Ḥanīfah, however, the preposition *bā'* does not express partition (*al-tab'īḍ*) – an opinion which is not right, since they all agree that saying 'I grabbed his shirt' is not the same as saying 'I grabbed part of his shirt', whereby the first sentence means the person seized the whole of it, while the second means he seized only some part of it. This shows that [the correct view is] what we have stated.

Section

The particle *lām* (ل) [meaning: for; in favour of; because of, for the sake of; due to; for the purpose of, so that] denotes possession (*al-tamlīk*). Some of Abū Ḥanīfah's disciples, however, say that it indicates specification (*al-ikhtiṣāṣ*) rather than possession, which is not correct because there is consensus that if a person says, 'This house belongs to Zayd', it means that he owns it. This [example] shows what we have just stated. Besides, [the particle *lām*] is also used to express causality (*al-ta'līl*), as in the *Qur'ān*: *"[We sent messengers as bringers of good tidings and warnings] so that human beings will have no ground to argue against God after the messengers [have been sent]"* (*al-Nisā'*, 4:165), as well as to signify consequence of an event (*al-'āqibah*) and transformation (*al-ṣayrūrah*), such as in the *Qur'ān* (*al-Qaṣaṣ*, 28:8): *"The family of Pharaoh picked him up [out of the river] so that he [i.e. Moses] would become to them an enemy and a [cause of] grief".*

Section

The particle *'alā* (عَلَى) [meaning: on, upon, against] indicates obligation (*al-ījāb*), such as one's saying: 'Mr. So-and-so has something [imposed] upon me', meaning that I owe him something.

Section

The particle *fī* (في) [meaning: in, on, at, within, about] is a preposition (*al-ẓarf*). For example, you say: 'I have dates in the sock', meaning that it is found in there.

Section

The particle *matā* (مَتَى) [meaning: when] is a preposition denoting time. You may say: 'When did you see him?'

Section

The particle *ayna* (أَيْنَ) [meaning: where] is a preposition denoting location, such as your saying: 'Where were you?'

Section

The particle *ḥattā* (حَتَّى) [meaning: till, until] is used to indicate aim, duration, distance or destination (*al-ghāyah*). For example, in the Qur'ān (*al-Ṭīn*, 97:5): *"[It is entirely peace] until the emergence of dawn".* Like the particle *'wa* (و)', it is also used for conjunction, but only to express inclusion of [the farthest], highest or the lowest in rank. For example, you say to include the highest in rank: 'People have come to me; even the Sultan [visited me]', and –in the opposite sense you say: 'Everyone talked to me, including the slaves'. Moreover, it is used as conjunction in a new sentence. For example, 'People stood up. And so did Zayd.'

Section

The particle *innamā* (إِنَّمَا) [meaning: but, but then, yet, however, rather, in contrast] is used to express restriction or exclusion (*al-ḥaṣr*) –that is, confining the thing into what is intended and rejecting everything else out of it. For example, you say: 'Only Zayd is in the house', meaning that nobody else is in there; 'Allāh alone is the only God' (*innamā Allāh ilāh wāḥid*), meaning that there is not but one God only.

[40]

THE CONDUCT OF THE PROPHET

In general, what the Prophet—may Allāh honour and grant him peace—did is either a form of worship performed in order to draw near (*qurbah*) to God or just a normal activity (*laysa bi-qurbah*). In the latter case, such as eating, drinking, dressing, standing and sitting, it is indicative of permissibility (*al-ibāḥah*), since he could never possibly concur with something prohibited. Now with regard to the former class of activity (i.e. a form of worship), it may be analyzed into three ways:

First, what he did intentionally in order to explain something else (*bayān li-ghayrih*). In this case, the ruling is derived from the thing being explained. If the thing being explained is compulsory, then the explanatory act is also compulsory. If it is recommended, then the explanatory act is likewise recommended. That it is explanatory is known either from an explicit statement, or when something is mentioned in the *Qur'ān* generally that requires explanation and yet no verbal explanation has come out so far, then it can be inferred that the action [of the Prophet] was meant to explain it.

Second, what he did purposely to obey [God's] command (*imtithāl li-amr*), whence it should be taken as a command. Clearly, if it is a duty, we know that he was obliged to do it; and if it is recommended, then we also know that he was encouraged to do it.

Third, what he did initially without any specific reason (*ibtidā'an min ghayr sabab*). Concerning this, our fellow [Shāfi'īte scholars] have three different opinions:

First, that he did it out of obligation (*'alā al-wujūb*), unless indicated otherwise. This is the view of Abū al-'Abbās and Abū Sa'īd. It is also the view held by Mālik and most of the scholars of Iraq.

Second, that he did it out of dedication (*'alā al-nadb*), unless there is an indication that he did it out of obligation.

Third, that it should be left undecided (*'alā al-wuqūf*); he did it neither out of obligation nor out of recommendation, unless indicated otherwise. This is the view of Abū Bakr al-Ṣayrafī, which [I hold to be] the most correct. The argument for this is thus: Since the possibility of the [Prophet's] act being compulsory is equal to the possibility of it being recommended, it is mandatory to refrain [from

making any definite judgment] as long as there is no clear indication for either.

Section

If the Prophet—may Allāh honour and grant him peace—did something which was known to be either obligatory or recommended, then it is a religious duty for us also to do it, unless mentioned elsewhere that it was specific to him. Yet, according to Abū Bakr al-Daqqāq, it does not automatically becomes a duty for us [to do it], unless so indicated. The blunder of this opinion is made plain in the Qur'ānic verse (*al-Aḥzāb*, 33:21): *"Indeed, there has been for you in the Messenger of Allāh an excellent example"*, but also because the Companions used to refer to the Prophet's deeds and emulate him, which shows that what he did is a religious duty for all [Muslims] as well.

Section

By the actions of the Prophet(s), all types of clarification can be legally established, including clarification of the obscure *(bayān al-mujmal)*, specification of the general *(takhṣīṣ al-'umūm)*, interpretation of the obvious (*ta'wīl al-ẓāhir*), and abrogation [of an earlier ruling] (*al-naskh*). An example of clarification of the obscure is his actual performance of prayer and pilgrimage, which was meant to explain what is mentioned without detail in the *Qur'ān* [any]. As for specification of the general, it is like his [general] prohibition of prayer after *aṣr* (late afternoon) until the sunset, which was later specified by another report saying that he did once perform a prayer after *aṣr* for some reason.[119] So, the latter makes an exception to the prohibitive rule. An example of interpretation of the obvious is the Prophet's clear prohibition of carrying out an-eye-for-an-eye punishment before the wound [in the part of victim's body] get healed (*al-qawd fi al-ṭaraf qabl al-indimāl*). But another report says that the Prophet did carry out such punishment [prior to complete

[119] On the basis of ḥadīth from Umm Salamah as reported by al-Bukhārī (2:87), Muslim (2:210), Abū Dāwūd (1273), and al-Dārimī (1443): *"You asked about the two raka'at after aṣr [which I just performed, i.e. whether or not it was allowed]. Well, I did that to replace the two raka'at after ẓuhr which I missed because I had guests from 'Abd al-Qays to attend to, who just converted to Islam"*.

recovery],[120] thereby, indicating that the prohibition is one of abomination (*karāhiyyah*) rather than a categorical ban (*taḥrīm*). Finally, abrogation [of previous rulings] such as the case of the Prophet's saying: *"[The punishment for premarital sexual intercourse between] two unmarried persons is flogging one hundred lashes and banishment for one year, while that [for extramarital sex between] two married persons is flogging one hundred lashes and stoning to death"*.[121] The latter of which was cancelled (*mansūkh*) by another report which says that he ordered a man called Mā'iz [who admitted to having committed adultery four times in his presence] to be stoned to death and did not flog him.[122]

Section

In case, there is a conflict of explanation between a statement and an action of the Prophet—may Allāh honour and grant him peace, scholarly opinions are divided into three: some of our colleagues hold that favour should be given to his statement [rather than his deed], whereas some others say that his action should be preferred [rather than his statement]. A third opinion says that both are of equal worth. Yet, [for me] the first opinion is the most correct one, because explanation is basically verbal *(al-aṣl fī al-bayān huwa al-qawl)*. Don't you see that a statement is effectual by virtue of its wording alone, whereas an action is effectual only by means of some proof? So, statement is worthier [than action].

[120] This is the *ḥadīth* of 'Amr ibn Shu'ayb as narrated by Aḥmad (2:217) and al-Dāraquṭnī (3:88).

[121] i.e. the *ḥadīth* of 'Ubādah ibn al-Ṣāmit narrated by Muslim (1690), Abū Dāwūd (4415), and al-Tirmidhī (1434).

[122] The report from Jābir ibn 'Abdillāh, *"rajama mā'izan wa-lam yajlid-hu"*, is given by al-Bukhārī (6438), Muslim (1695), Abū Dāwūd (4428), and al-Tirmidhī (1428).

[41]

THE PROPHET'S ENDORSEMENT AND SILENCE ABOUT A CERTAIN RULING

Endorsement (*al-iqrār*) is said to have occurred when the Prophet—may Allāh honour him and grant him peace—heard something but did not deny or despise it, or when he saw something being done and did not condemn it, even though there was no hindrance [for him to prevent or stop it], which indicates therefore its permissibility. For example, it is reported that the Prophet—may Allāh honour and grant him peace—heard a man saying: *"Suppose one finds another man with his wife; if he were to kill the man, he would be killed; if he were to accuse the man, he would be flogged; and if he were to remain silent, he could only do so in fury; so, what should he do?"*. Since the Prophet—may Allāh honour and grant him peace—did not say anything against it, it was then concluded that murder is to be retaliated and the punishment for slander is flogging.

Another example comes from a report that the Prophet saw a man called Qays praying two voluntary *raka'at* of *Fajr* (dawn prayer) after *Ṣubḥ* (morning prayer) and he did not denounce it, which shows the permissibility of performing a prayer after *Ṣubḥ* due to an acceptable reason. Indeed, it is not allowed for him to see something wrong being done and just leave it when he is capable of denouncing it, because doing so would imply its permissibility.

Section

As for what was done during the Prophet's lifetime which he did not denounce, we have to look into it closely. If it belongs to the type of things that is impossible for him not to know it by standard norms, then it is similar to that which he would not denounce had he seen it. For example, it is reported that Mu'ādh once prayed *'Ishā'* together with the Prophet—may Allāh honour and grant him peace—, and no sooner had he come back to his people among the Banī Salamah, than he led another prayer with them, which was for him a voluntary one, whereas for them, it was the obligatory *'Ishā'* prayer. This incident points out the permissibility of performing an obligatory act

behind or along with somebody performing a voluntary one. It is impossible for this kind of act to have escaped the Prophet's notice, and so, were it not permissible, he would have denounced it.

But, if it was something that the Prophet—may Allāh honour and grant him peace—might have not noticed, such as when one of the Anṣār Companions said: *"During the lifetime of the Prophet—may Allāh honour and grant him peace, we used to have sexual intercourse without ejaculating and did not used to perform the ritual bath"*. This does not indicate any ruling [i.e. approval] since it was done in private and it is possible that the Prophet—may Allāh honour and grant him peace—did not know that they were doing such a thing and were not performing the bath. The unaffected ruling (*aṣl*) is that washing the body is not an independent obligation [thus if the Prophet—may Allāh honour and grant him peace—noticed that a person seemed unwashed he wouldn't simply assume that the person was unwashed after sexual intercourse]. In fact, this is what Caliph 'Umar said on hearing the incident: "Is the Prophet—may Allāh honour and grant him peace—aware of this and approved of it?" They replied: "No". 'Umar said: "So then?"

Section

As for keeping silent about a ruling, it is when he [i.e. the Prophet] sees someone doing something and did not pass any judgment on it, in which case it must be looked into closely. If it was not about something necessary, then his silence implies neither obligation nor elimination [of duty], as it is possible that he postponed the clarification until the need arises. However, if it was concerning what is necessary, such as the case of a Bedouin who asked the Prophet—may Allāh honour and grant him peace—about [the punishment for having] sexual intercourse during Ramaḍān, whereby he imposed upon the man the duty of manumission and not on the wife, then the Prophet's silence indicates that it was not obligatory, because delaying clarification when it is urgently needed is not allowed.

[42]

ON REPORTS (*AL-AKHBĀR*)

[What follows is] an explanation about [the nature of] report (*khabar*) and its form [of expression]. A report is either true or false, and it has a typical form (*ṣīghah*) according to conventional linguistic usage. For example, one says: Zayd is standing, whereas 'Amr is sitting, etc. The Ash'arite scholars maintain, however, that it has no special form. The blunder of this opinion is made clear by the fact that experts on language divide speech into four types: command, prohibition, report, and question. A command is like your saying, "Do it!", whereas prohibition is when you say: "Don't do it!" A report is like your saying, "Zayd is at home", whereas question is when you say, "Is Zayd at home?" All this supports our view [that report has a special form of expression].

[43]

SUCCESSIVELY-TRANSMITTED REPORT

You should know that reports are of two types: Successively-transmitted report (*mutawātir*) and Solitary-transmitted report (*āḥād*). Discussion of the solitary-transmitted report will follow in due course —God willing.

The successively-transmitted report is one the informant of which is known 'necessarily' (*ḍarūratan*). It is of two kinds: [1] Successively-transmitted *by way of words* [i.e. having been passed down through various chains of transmission in an unbroken manner from generation to generation through centuries] (*min ṭarīq al-lafẓ*), such as the widely accepted reports concerning past events and remote countries and [2] Successively-transmitted *by way of meaning* (*min ṭarīq al-ma'nā*), such as various reports about the generosity of Ḥātim [al-Ṭā'ī], the courageousness of 'Alī ibn Abī Ṭālib, etc. Both of these types yield knowledge. The Brahmans' view, which says that knowledge cannot be based on a report, is nothing but ignorance. For we do find ourselves, by virtue of successively-transmitted reports, having some knowledge about Makkah, Khorasan, etc., just as we derive knowledge from the senses. Indeed, if one cannot deny [the validity of] knowledge coming from the senses, one must admit [the validity of] knowledge derived from reports.

Section

Knowledge derived from a report is necessary (*ḍarūrī*). But the Mu'tazilite al-Balkhī says: that knowledge based thereupon is derivative (*iktisāb*) –a view maintained by Abū Bakr al-Daqqāq, which is false, since it is impossible for one to deny the knowledge obtained from successively-transmitted reports in one's mind, not by doubt nor by specious argumentation. Therefore, just like knowledge derived from the senses, it must be necessary.

Section

It should be noted, however, that being transmitted by way of successive transmission (*tawātur*) does not yield necessary knowledge

except when the following three conditions are met. First, the informants must be numerous enough that it would be inconceivable for them to have conspired to lie. Second, the chain of transmitters must be of the same quality both in the beginning and the end, as well as in between, in such a way that the information was passed to a large number of people by those like them reaching back to the source. Third, the report should originally be based on eyewitness report or firsthand information. Otherwise, if it is based on reasoning and personal judgment like such done by scholars whereby it leads to certain conclusions, then it cannot yield necessary knowledge.

Some of our scholars think, however, that the number [of people involved in the transmission] should all be Muslim. Some people also say that their number should not be less than twelve, while others maintain that they should be at least seventy in number. Another opinion says that their number must be no less than three hundred or even more. But all this stipulation is mistaken because the resulting knowledge is not specifically due to what they say, and so all those considerations fall away.

[44]

SOLITARILY-TRANSMITTED REPORTS (*AKHBĀR AL-ĀḤĀD*)

You should know that the so-called individual report is that which falls short of the standard of the successive transmission (*tawātur*), and it is of two kinds: the connected report (*musnad*) and the disconnected report (*mursal*). The disconnected report (*mursal*) will be discussed in the next section –God willing. Now, the connected report (*musnad*) [being generally applied to report with a fully connected chains of transmission (*isnād*) traced to the Prophet—may Allāh honour and grant him peace—is of two types: That which yields knowledge, which includes reports coming from God Almighty as well as reports coming from the Prophet—may Allāh honour and grant him peace. Also included under this category is what someone said in the presence of the Prophet—may Allāh honour and grant him peace—and claimed to know, which [the Prophet] did not deny, resulting in the affirmation of its veridical value; or one narrated something in front of a large group of people and claimed that they knew what he was narrating, and they did not deny it, thereby confirming its truth; or solitarily transmitted narration that were accepted by the community (*ummah*) and so is established as true, regardless of whether it is practiced by the whole community or some of them only, and is explained away by some others; all these kinds of reports not only necessitate action but also, by logical inference, entails knowledge. The second type [of connected report] is that which necessitates action but does not entail knowledge, such as reports transmitted in the *ḥadīth* compilations such as the *Sunan* and the *Ṣiḥāḥ* and the like. However, some scholars say that it does entail knowledge, while some *ḥadīth* scholars maintain that those with a shorter chain of transmission (*mā 'alā isnāduhu*) entail knowledge. According to al-Naẓẓām, such statement may lead to knowledge provided that it is accompanied by some cause; for example, seeing a man who has torn his shirt may inform one about the death of the man's relative. Still, [Muḥammad ibn Isḥāq] al-Qāshānī and Ibn Dāwūd maintain that it does not necessitate action, which is indeed the view of the Rāfiḍite [Shī'ites]. Those people disagree even

further; some of them say that logically it does not necessitate action, while others say logically it does, even though the law does not clearly say so.

The argument for the former view is this: if it were to necessitate knowledge, then, knowledge would spring from reports brought by anyone who claims prophethood or ownership of something that belongs to others; but since in fact it does not, it cannot be said to necessitate knowledge. As for the argument in support of the view that reason does not prohibit its practice (*al-ta'abbud bih*), we can say: if practice based on a *muftī*['s opinion] and on the basis of a witness' testimony is permitted, even logically, let alone [practice on the basis of] the reporter's report (*khabar al-mukhbir*). Now, the argument for the view that it necessitates action from Islamic legal point of view is thus: the Companions [of the Prophet]—may Allāh be pleased with them all—used to refer to it in matters of law, as did Caliph 'Umar who referred to the *ḥadīth* of Ḥaml ibn Mālik pertaining to the compensation (*diyah*) to be paid for the killing of a foetus, saying, *"Had we not heard this [report], we would have ruled otherwise"*.[123] Similarly, when dealing with the case of residential houses, Caliph 'Uthmān referred to the *ḥadīth* of Furay'ah bint Mālik.[124] Caliph 'Alī ibn Abī Ṭālib also referred to solitarily-transmitted reports, although he would demand an oath from the reporter. He said, "Whenever anyone told me something from the Prophet—may Allāh honour and grant him peace, I would ask him to swear, and if he did, I would trust him, exception Abū Bakr; Abū Bakr would narrate to me, and surely Abū Bakr is truthful".[125] 'Abd Allāh ibn 'Umar too referred to the *ḥadīth* of Rāfi' ibn Khudayj on *mukhābarah*,[126] just as other

[123] The report, coming from al-Mughīrah ibn Shu'bah and 'Abdullāh ibn 'Abbās, is given by Muslim (5: 111), Aḥmad (1: 364 and 4: 244), Abū Dāwūd (4571 and 4572), Ibn Mājah (2633 and 2641), al-Tirmidhī (1411), and al-Nasā'ī (8: 21 and 49). In al-Bukhārī (6910) from Abū Hurayrah, it is narrated: Two women from Hudhayl tribe fought and one of them threw a rock at the other and killed her and the child in her womb. When they referred the matter to the Prophet—may Allāh honour and grant him peace, he ruled that the *diyah* to be paid for her foetus was a slave, male or female.

[124] The *ḥadīth* is narrated by Mālik in his *al-Muwaṭṭa'* (2:591), Aḥmad (6:370), Abū Dāwūd (2300), Ibn Mājah (2031), and al-Tirmidhī (1204).

[125] This saying is reported by al-Ḥumaydī, Aḥmad (1:2), Abū Dāwūd (1521), Ibn Mājah (1395), and al-Tirmidhī (406).

[126] *Mukhābarah* is a type of contract in which the owner of a land and seeds contracts someone to work the land and plant the seeds for some of the produce as payment.

Companions of the Prophet—may Allāh honour and grant him peace—referred to the report from 'Ā'ishah concerning purification after sexual intercourse.[127] All of this demonstrates the practical significance [of solitarily-transmitted report from legal point of view].

Section

It does not matter whether the report is transmitted by only one or two people. According to al-Jubbā'ī, it should not be accepted unless transmitted by two people from two others. This opinion is mistaken, however, because the report here is about legal matters, which, like a *fatwā*, may be accepted even if it comes from one person.

Section

It is necessary to accept and act on solitarily-transmitted report when it pertains to cases that are both: deemed relevant to contemporary needs and of wide occurrence (*fī-mā ta'umm bihi al-balwā*), and those are not. The disciples of Abū Ḥanīfah think it is not permissible to do so, but we can show the blunder of their opinion by stating that since it belongs to the religious law that admits of scholarly judgment (*ijtihād*), we may affirm it to be so based on a solitarily-transmitted report in analogy to that which is neither relevant to contemporary needs nor of wide occurrence (*qiyāsan 'alā mā lā ta'umm bihi al-balwā*).

Section

[Solitarily-transmitted report] is acceptable even if it disagrees with analogy (*qiyās*) and so takes precedence over the latter. The disciples of Mālik insist that it should not be accepted when it contradicts analogy, whereas the disciples of Abū Ḥanīfah say that it need not be accepted only when it contradicts analogy with the primary sources (*al-uṣūl*), citing as examples the case of bankruptcy (*al-taflīs*), lottery (*al-qur'ah*), the dairy cattle being left unmilked for several days (*al-muṣarrāh*). Now, in reply to the disciples of Mālik, we say that a report represents the intention of the Law-giver explicitly, whereas analogy indicates his intention implicitly; and since the explicit is stronger [than the implicit indication], it must be given priority over the latter. As for the disciples of Abū Ḥanīfah, [we can say that] if what they

[127] i.e. the *ḥadīth* of 'Ā'ishah, *"Idhā jāwaz al-khitān al-khitān fa-qad wajab al-ghusl"*.

mean by *al-uṣūl* is the analogy to what is established by the sources [of law], it would be the same view as is maintained by the disciples of Mālik, the error of which we have just explained. If, however, they mean by it the sources themselves –i.e. the *Qur'ān*, the *Sunnah*, and the Consensus (*al-ijmā'*), then they have no support from the *Qur'ān*, the *Sunnah*, and the Consensus to reject the validity of solitarily-transmitted reports, and with it their argument falls away.

[45]

REPORTS WITH DISCONNECTED CHAINS OF TRANSMISSION (*AL-MARĀSĪL*)

A disconnected report (*mursal*) is one with a disconnected chain of transmitters, i.e. one that is transmitted by someone from an earlier authority whom he never met in person, leaving one missing link in between. Being of two kinds only, it is either coming from the Companions (*marāsīl al-ṣaḥābah*) or from other people. The former category must be acted upon because the Companions are people with undisputed authority.

Section

The disconnected reports of other than the Companions must be looked into closely. With the exception of Sa'īd ibn al-Musayyab's disconnected reports, those of the rest are practically not binding, although Mālik and Abū Ḥanīfah say that they are practically binding just like the connected report. 'Īsā ibn Abān says that the disconnected reports of the Followers (*al-Tabi'īn*) and the Successors (*Tābi'ī al-Tābi'īn*) are to be accepted, whereas that of others are not, unless the transmitter was a leading authority (*illā an yakūn al-mursil imāman*). Supporting our view is that personal integrity (*al-'adālah*) is required for the report to be accepted, and those whose names are left unmentioned could be either reliable (*'adl*) or unreliable, in which case his report should be rejected unless he is identified.

Section

With regard to Sa'īd ibn al-Musayyab's disconnected reports, al-Shāfi'ī has declared, "For us, his disconnecting report (*irsāl*) is fine". This is why some of our colleagues say that his disconnected reports are valid proofs, because, having been examined, they all turned out to be connected reports. There are scholars, however, who say that they must be treated like other disconnected reports, and that al-Shāfi'ī deemed them well enough (*istaḥsanahā*) to have supportive legal implications, not that they can be primary legal evidences.

Section

If a narrator says: "I have been informed by a credible authority (*akhbaranī al-thiqah*) who learned it from al-Zuhrī", it should be treated as disconnected report, because the authority mentioned is unknown to us, so its mention meaningless to us. As for the on-the-authority-of report (*khabar al-'an'anah*), if he says, "Mālik has told us from al-Zuhrī", then it is considered connected reports (*musnad*). There are scholars who take it as equivalent to the disconnected report (*mursal*), which is wrong, since it appears to be the result of direct learning from al-Zuhrī, even though the expression used is that of the on-the-authority-of report (*'an'anah*). In conclusion, this kind of report must be accepted.

Section

Now, if he (i.e a narrator) says, "I have been informed by 'Amr ibn Shu'ayb ibn Muḥammad ibn 'Abdillāh ibn 'Amr ibn al-'Āṣ, from his father, from his grandfather, from the Prophet—may Allāh honour and grant him peace", then, it should be regarded as disconnected report, as it might have been transmitted by the nearest grandfather, namely Muḥammad ibn 'Abdillāh ibn 'Amr ibn al-'Āṣ, and so it would be disconnected report; but, it could also have been transmitted by the remote grandfather, namely 'Abdillāh ibn 'Amr ibn al-'Āṣ, in which case it would be Connected report. Therefore, it cannot become a valid proof (*lā yuḥtajju bihi*), since it implies both possibilities of disconnecting transmission (*irsāl*) and connecting transmission (*isnād*); nor can it be established while there is still doubt, unless it is confirmed that he did in fact get it from his remote grandfather, in which case it would become a valid proof.

[46]

THE QUALIFICATION OF A TRANSMITTER AND THOSE WHOSE REPORTS ARE ACCEPTABLE

You should know that a report will not be accepted until the transmitter has at the time of his learning attained some discretion (*mumayyiz*) and accuracy (*ḍābiṭ*), for otherwise he would not know what he was transmitting, though it is alright even if he had not reached adulthood when he heard the *ḥadīth*. Some scholars are of the opinion that he should be an adult when he heard it, which is incorrect because the Muslims have agreed to accept the *ḥadīth* of junior Companions and to base their practice upon what they heard during their childhood, such as that of Ibn 'Abbās, Ibn al-Zubayr, al-Nu'mān ibn Bashīr, Maḥmūd ibn al-Rabī', and many others. This supports what we have just stated.

Section

A transmitter should be someone of integrity (*'adl* i.e. known to be pious and honest, truthful and reliable) who avoids grave sins and stays away from such things that would detract from the intergrity of his personality, including an open and public transgression of religious and moral norms (*al-mujūn*), weak-mindedness or mental deficiency (*sakhf*), eating in the marketplace, and urinating by the roadside. For if he cannot avoid all this, there will be no guarantee he would not be lenient in transmitting what has no basis at all. Indeed, Caliph 'Alī ibn Abī Ṭālib rejected the testimony of Abū Sinān al-Ashja'ī, dubbing him 'the one who urinates on his own heels' (*bawwāl 'alā 'aqibayhi*).[128]

[128] The case is narrated by Aḥmad (3:480), al-Dārimī (2252), Abū Dāwūd (2115), Ibn Mājah (1891), al-Tirmidhī (1145), and al-Nasā'ī (6: 121).

Section

Moreover, a transmitter should be credible (*thiqah*) and trustworthy (*ma'mūn*), neither a liar nor accustomed to making accretion to *ḥadīth*, or else his report would not be accepted, for there is no guarantee that he would not put into the Prophet's mouth what the latter has never said.

Section

In addition, a transmitter should not be a heretic *(mubtadi')* who is preaching to people his heresy (*bid'ah*), lest he would fabricate hadīth in conformity with his heretic beliefs. Some scholars say that if he does not propagate his heresy, then we may accept his report. However, the correct position for me is that it should not be accepted, since a heretic is religiously corrupt *(fāsiq),* his report cannot be accepted.

Section

Further, a transmitter should not be a prevaricator (*mudallis*), i.e. someone who transmits a *ḥadīth* from an authority whom he did not hear personally and yet he gives the impression that he did, or someone who transmits a *ḥadīth* from an authority known to be of certain affiliation or name and yet he deliberately replaces it with another, less familiar name of the person to give a false impression. Most scholars reprobate it, although it does not invalidate his transmission; and this is the view of some of our colleagues, considering that he did not clearly lie. Some scholars, however, maintain that his statement should be rejected, because by giving a false impression about someone he did not personally hear from, he has committed fraud, which is no different from an outright lie, and by replacing the familiar name with the unknown one, he has deceived people about the transmission from someone whose narration may not be fully acceptable by the scholars of *ḥadīth*. Therefore, we must put his *ḥadīth* on suspension (*tawaqquf*).

Section

Finally, a transmitter should be accurate (*ḍābiṭ*) at the time of transmission, fully comprehending what he is transmitting.

Consequently, if he is heedless (*mughaffal*), his report will not be accepted, lest he would transmit something which he never heard. Yet, if his mind is of alternate alertness and heedlessness, then what he transmits during his alertness can be accepted. However, if a *ḥadīth* is transmitted from one, and it is uncler whether he narrated it in a state of alertness or heedlessness, we are not obliged to accept and put it into practice.

[47]

NEGATIVE AND POSITIVE ATTESTATIONS (*AL-JARḤ WAL-TA'DĪL*)

In whole, we can say that a transmitter is either known to be of integrity (*ma'lūm al-'adālah*), corrupt (*ma'lūm al-fisq*), or that [his state of integrity is] unknown (*majhūl al-ḥāl*). If his integrity is well-known, like that of the Companions—may Allāh be pleased with them—and some of the Successors including al-Ḥasan [al-Baṣrī], 'Aṭā' [ibn Yasār], ['Āmir ibn Sharaḥbīl] al-Sha'bī, [Ibrāhīm ibn Yazīd] al-Nakha'ī, as well as the eminent jurists like Mālik, Sufyān [al-Thawrī], Abū Ḥanīfah, al-Shāfi'ī, Aḥmad, Isḥāq [ibn Rāhawayh], and those who belong to their rank, then we must accept their report and there is no need to examine their integrity. Some Mu'tazilites and Heretic groups (*al-mubtadi'ah*, e.g. Shī'ites) claim that there were some corrupt people (*fussāq*) among the Companions, namely those men from Iraq and Syria who fought against [the legitimate Caliph] 'Alī ibn Abī Ṭālib and, not fearing Allāh, dared to cross the line; they mention among them Ṭalḥah, al-Zubayr, and 'Ā'ishah. But this is a serious charge against the forebears. To show the falsity of their opinion we maintain that the integrity of those [Companions of the Prophet] has been well-established and their clean reputation so well-known that we cannot afford to abandon it unless there is a definite proof [to the contrary]; indeed no act of disobedience come from them which was deliberately done; as for the war between them it merely occurred due to their differing interpretation, which is why many among the besot of the Companions and the Followers—may Allāh be pleased with them—refrained from supporting Caliph 'Alī ibn Abī Ṭālib and excused themselves from joining the battle as they had no clear idea [of who was right and who was wrong], such as Sa'd ibn Abī Waqqāṣ, 'Abdullāh ibn 'Umar, followers of 'Abdullāh ibn Mas'ūd, and many more. We cannot, therefore, use it to impugn their character; for even Caliph 'Alī ibn Abī Ṭālib himself allowed people to accept their testimony and to join prayer with them.

Section

With regard to Abū Bakrah and his fellow witnesses who were whipped [by Caliph 'Umar] for being guilty of unfounded accusation (*qadhf*), their reports can still be accepted since they did not say what they did as slander, but rather as testimony. Caliph 'Umar only flogged them on the basis of his own discretion (*ijtihād*), which is why he did not reject their reports.[129]

Section

If a transmitter is known to be corrupt, definitely his report cannot be accepted, regardless of whether his corruption is based on an incorrect interpretation of revealed texts or not. Yet some theologians say that the reports of a person whose religious corruption is based on faulty interpretations of religious texts can be accepted, provided we can trust him on his religion, even if they are infidels [i.e. non-Muslims]. This is supported by God's saying (*al-Ḥujurāt*, 49:6), *"If a corrupt person comes to you with any news, do verify it, lest you cause harm to people unknowingly"*, which makes no distinction; and also since interpretation does not exclude his being infidel (*kāfir*) or corrupt (*fāsiq*), he cannot be excluded from those whose report should be rejected.

Section

When the personality of a transmitter is unknown, his reports cannot be accepted until his integrity is established. Abū Ḥanīfah's disciples are of a different opinion, however, saying that it is acceptable. Our argument is thus: Every report that is not accepted from a corrupt

[129] Abū Bakrah, whose full name was Nufay ibn Ma'rūq, may Allāh be pleased with him, was convinced by his own eyes that the man and woman in question were guilty of fornication and he refused to pray behind that man. He wrote to the Caliph, went to see him, and then bore witness against that man according to his conscience along with three other witnesses as the Law demands. But because the fourth witness retracted his testimony or was found unacceptable, the conviction fell through and the witnesses whipped and declared unreliable, as the Law also demands. After the whipping, Abū Bakrah still said, "I spoke the truth and the man did do what I said." When Caliph 'Umar motioned to whip him again, 'Alī said, "If you do, then have the other one stoned!" i.e. the testimonials would now amount to four.

person cannot be accepted from an unknown person either, just like court testimonies.

Section

It is mandatory to investigate the inner integrity (*al-ʿadālah al-bāṭinah*), just as it is required in testimony. Some of our colleagues, however, say that it is sufficient to look into the outer integrity, since the basis lies in what is visible and in thinking well (*ḥusn al-ẓann*) of people, which is why we even accept the report of a slave.

Section

In case there are two persons having a common name and the same affiliation, one of them being reliable and the other being corrupt, we can only accept the report transmitted under the name if we can ascertain that it comes from the one who is reliable.

Section

Negative and positive assessment of a transmitter is valid even if it is given by one person only. Some of our colleagues, however, hold that it can be valid only if it comes from two individuals, just like avowing the uprightness of a witnesses. [For me] the first view is the correct one, because a report is accepted even if it comes from one person, then so should be the recommendation of a transmitter.

Section

A favourable remark is only accepted from those familiar with the requirements of integrity and that which ruins one's religious reputation. For if we were to accept [a favourable remark] from someone who does not know all these, we would risk affirming the integrity of someone who is actually corrupt, or impugning the character of another who is in reality reliable.

Section

In making a positive appraisal, suffice it to say: "He is reliable". Some of our colleagues say that it is necessary to declare: "[I believe he is reliable whether] for (*li*) or against (*ʿalā*) me, he is reliable", while

other scholars insist that the reason be stated to justify it. The argument in support of the view that it suffices to say: "He is reliable", is that such a declaration already implies that the person in question is so and therefore there is no need for additional remark. As for the second point, we do not need further justification exactly because we accept a positive attestation only from those acquainted with the requirement of personal integrity, hence, no need for explanation of the requirement.

Section

A negative remark is accepted only when it is detailed. Hence, if a critic simply says: "He is weak (*daʿīf*)" or "He is corrupt (*fāsiq*)", we cannot accept it. According to Abū Ḥanīfah, if one says: "He is corrupt", without any clarification, it is acceptable. But this view is incorrect, because people have different criteria for rejecting a report and disqualifying a person, whereby what some people regard as a criticism might not be taken as a criticism by others; therefore, it must be spelled out.

Section

If a person is praised by one and criticized by another, the criticism should be given priority, because with regards to a legal witness, a critique is regarded as extra-knowledge about the person in question and so is given priority over the one who gives a favourable remark.

Section

If a reliable person is transmitting from an unknown individual, this cannot be taken as certification [of the latter's integrity]. Some of our colleagues think so, which is not correct, since we do find many reliable authorities who have transmitted *ḥadīth* from manipulators (*mudallisīn*) and liars (*kadhdhābīn*). This is why al-Shaʿbī said: "I was informed by al-Ḥārith al-Aʿwar, who—I swear by Allāh—is a liar", which shows that narrating from him is no certification of his personal integrity.

Section

However, if an unknown person's report is practiced by a reliable authority, and the latter openly declares it, then it can be considered as recognition of the former's personal integrity, because he is not allowed to do so unless and until he has testified to the former's integrity. Yet, if he simply practices what is implied by the *ḥadīth*, rather than with the *ḥadīth* itself, then it cannot be taken as a positive appraisal. This is because it is possible that the implication is inferred from the *ḥadīth* by way of analogy and other proofs. Therefore, it cannot be taken as a positive appraisal.

[48]

THE METHOD OF TRANSMISSION AND RELATED ISSUES

The best way of narration is to transmit a report in its exact words. The Prophet—may Allāh bless him and grant him peace—says: *"May Allāh illuminate anyone who heard what I said, grasped it, and 'passed to others what he has heard' (thumma addāhā kamā sami'a). Indeed, many a person carries knowledge who does not understand it, and many a person carries knowledge to another who is more intelligent than him".*[130] So, if one is conveying only the meaning of a *ḥadīth* (*al-riwāyah bil-ma'nā*) i.e. not literally, then, it be must looked into more closely. If he does not know the meaning of the *ḥadīth*, he is not allowed to do so, lest he would change the meaning of the *ḥadīth*. But if he knows the meaning of the *ḥadīth*, then we have to see: If it is an ambiguous statement, then he is not allowed to convey the meaning only, for he might misrepresent the Prophet's intention, and therefore narrating by one's own words is not permitted. If, however, it is a clear report, then there are two views on this: Some of our colleagues do not allow it, because the exact wording could be meant for religious worship, such as the phrase *'Allāhu akbar'* for prayer; yet another opinion says that it is permissible, for as long as he conveys the meaning, his wording stands for it. Indeed, the Prophet is reported to have said: "If you grasp the meaning, then there should not be any problem" (*idhā aṣabta al-ma'nā fa-lā ba'sa*).[131]

Section

After all, it is better to transmit a *ḥadīth* in its entirety. To transmit it in part and leave the remaining part is not allowed according to

[130] The *ḥadīth*, through Zayd ibn Thābit, is narrated by Ibn Mājah (232), and al-Tirmidhī (2657).

[131] al-Haythamī in his *Majma' al-Zawā'id* notes that this *ḥadīth* is narrated by al-Ṭabrānī in his *al-Mu'jam al-Kabīr* from a certain Ya'qūb ibn 'Abdullāh ibn Sulaymān ibn Ukaymah al-Laythī, from his father, from his grandfather. Ibn al-Jawzī includes it in his *Kitāb al-Mawḍū'āt* among fabricated *ḥadīths* going back to al-Walīd ibn Salamah. However, Ibn Mandah cites this *ḥadīth* in his *Kitāb al-Waṣiyyah* from two channels both going back to al-Walīd ibn Salamah.

those who insist on literal, verbatim transmission. As for those who allow transmission by meaning, they still disagree on this: Some of them say that if he or someone else has transmitted it in full at least once, then it is allowed to transmit it in part, but otherwise, if neither he nor anyone else has ever transmitted it in full, it is not permissible to transmit it in part. Further, if the *ḥadīth* contains two unrelated points, then it is allowed to convey either one of them without the other; and this is the correct opinion. Yet, there are scholars who say that it is permissible in any case. Our argument for the correct position is that if the two points in the *ḥadīth* are interrelated, then it would be misleading to leave part of it, because the ḥadīth could be put into practice literally, thereby ignoring one of the requisites of the conclusion; if, however, the two points are unrelated to one another, then, like two different *ḥadīths*, it is permitted to transmit either one of them without the other.

Section

Those who do not memorize *ḥadīth* should transmit it from a book, and even those who memorize it are urged to transmit it from a book as it is much safer, although he is allowed to transmit it from memory. As for someone who does not memorize it but has with him a book containing his auditions in his own handwriting and about which he mentions that he himself heard the *ḥadīth*, it is permissible for him to do so from his book, even if he does not quote all the ḥadīths in his book. But, if he does not mention that he himself heard the ḥadīth, then there are two opinions, one saying that it is permissible to transmit *ḥadīth* from a book, and this is what we read in [al-Shāfi'ī's] *al-Risālah*; and another opinion which says that it is not permitted, and this is the correct opinion, because we cannot simply trust his writing as it may sometimes appear obscure to him, and it is not allowed to draw upon a dubious source.

Section

If someone learns a *ḥadīth* from a teacher, but the teacher later forgets it, the *ḥadīth* is still acceptable. [Abū al-Ḥasan 'Ubaydullāh ibn al-Ḥusayn ibn Dallāl] al-Karkhī, one of Abū Ḥanīfah's disciples, says, however, that in that case, the ḥadīth falls away. This is a wrong opinion, because the transmitter is reliable, even if the teacher may have forgotten the *ḥadīth*, and so the transmission should remain

apparently valid. Yet, if the teacher later denounces the *ḥadīth*, thereby accusing the transmitter of lying, then the *ḥadīth* falls away, because the teacher categorically denies it and rejects the *ḥadīth*, resulting in the disciple's narration contradicting the teacher's statement, rendering both invalid. Still, this denial does not depreciate the overall transmission from him, as they both charge each other with lying.

Section

If a teacher recites a ḥadīth to you, then you are allowed to say: "I heard him" (*sami'tuhu*), "He told me" (*ḥaddathanī*), "He informed me" (*akhbaranī*), and "He read to me" (*qara'a 'alayya*), regardless of whether or not he said: "Transmit it from me" (*irwihi 'annī*). And if he dictates it to you, then you may use all the above-mentioned expressions, including of course saying: "He dictated to me" (*amlā 'alayya*), since all of these are true. However, if you read a *ḥadīth* in front of him whilst he, listening to you, remained silent, then you are not allowed to say: "I heard him", nor "He told me", nor "He informed me". There are some people who allow it, which is not true, as it never took place. Yet, if the teacher says to his student: "It is as you read to me and so read it!" (*huwa kamā qara'ta 'alayya fa-iqra'!*), then he is permitted to say: "He informed me" (*akhbaranī*), though not "He told me" (*ḥaddathanī*), as the former expression covers all kind of information, in contrast to the latter, which is used strictly for what is heard in a direct-from-the-mouth communication. By the same token, if the teacher only gives him licence to transmit, then he is not allowed to say: "He told me" (*ḥaddathanī*) nor "He informed me" (*akhbaranī*); of course, he may say: "He granted me licence" (*ajāza lī*) and "He informed me through a licence" (*akhbaranī ijāzatan*), and this is legally binding in practice, although the literalists *(Ahl al-Ẓāhir)* say the opposite, which is wrong, considering the fact that the aim here is to establish what came from the Prophet—may Allāh honour and grant him peace. Therefore, there is no difference between pronouncing it literally or expressing it in other words. Finally, if someone writes to him, whose writing he recognizes, then he may say: "He wrote it for me" (*kataba ilayya bihi*) and "He informed me by way of writing" (*akhbaranī kitābatan*). Still, some of our colleagues say that we cannot accept writing, just as we do not take it for testimony; but this is a mistaken opinion, because all information is based on thinking well of others (*ḥusn al-ẓann*).

[49]

THE CRITERIA FOR REJECTING THE SOLITARILY-TRANSMITTED REPORT

A report [i.e. *ḥadīth*] transmitted by someone reliable may be rejected on account of the following. First, it contradicts the necessary truths of reason (*mūjibāt al-ʿuqūl*), in which case, we know that it is erroneous, since the Sharīʿah runs in accordance only with that which is rationally possible, and not by what is logically impossible. Second, it contradicts the plain text of the *Qur'ān* or the successively-transmitted tradition (*sunnah mutawātirah*), thus, making it known that it is baseless or has been abrogated. Third, it contradicts the consensus, in which case it would be proven to be either abrogated or baseless, since it cannot be correct and unabrogated whilst the consensus of the people runs counter to it. Fourth, when someone singularly transmits a *ḥadīth* which the entire community should know [i.e. cannot possibly miss], then we know that it has no solid basis, since it is impossible for it to have some basis if he alone knows it to the exclusion of the rest of creatures. Fifth, when someone transmits a *ḥadīth* which is usually transmitted by a large number of people, it cannot be accepted, for it is impossible for him to have an exclusive access to such kind of tradition. Yet, if such tradition contradicts the legal inference (*qiyās*), or if someone transmits something which is of concern to the public, it is not rejected. We have discussed various opinions on this, and so, there is no need to repeat here.

Section

However, if someone singularly transmits a *ḥadīth* that is not transmitted by anyone else, then his *ḥadīth* is not rejected. Similarly, if he alone narrated a *ḥadīth* connectedly that others narrated disconnectedly, or he alone attributed to the Prophet (*marfūʿan*) what others attributed it to the Companion (*mawqūfan*), or he added what others did not, then, according to some *ḥadīth* scholars, it should be rejected, whereas the disciples of Abū Ḥanīfah say that it should be rejected only if he does not transmit the original version. But, this is a mistaken view, since one could hear a *ḥadīth* in full which another did

only in part, just as it is possible that one heard a *ḥadīth* along with its chain of transmission or being attributed to the Prophet—may Allāh honour and grant him peace—by a Companion (*marfūʿan*). Therefore, the narration of reliable authorities should not be simply abandoned because of it.

[50]

PREFERRING A REPORT OVER ANOTHER

In general, two conflicting statements should, whenever possible, be reconciled and put in order for use, and, in case it is not possible, one be abrogated with the other, as we have already explained in the chapter on proofs which can and cannot be specified, and again, in case, this is also not possible, one should be favoured over the other in one respect or another. This favouring (*tarjīḥ*) of one evidence over another pertains to two aspects [of the *ḥadīth*]: first, the transmission chain (*isnād*), and second, the content (*matn*). The first one is carried out by looking into the following aspects:

i. Whenever there are two transmitters, one being senior and another junior, the senior's narration is to be favoured, because he is [probably] more meticulous (*aḍbaṭ*), which is why ['Abdullāh] ibn 'Umar favoured his own transmission concerning the issue of *ifrād ḥajj* [i.e. the Prophet's *ḥajj* being *ifrād ḥajj*] over that of Anas ibn Mālik, saying: "Anas was still a small boy playing with ladies who did not cover some parts of their bodies, when I took hold of the rein of the Prophet's camel and its saliva was dripping on me".[132]
ii. In case there are two transmitters, one being more learned than the other, the former should be favoured because he must have understood what he heard better than the latter.
iii. In case one of them is closer to the Prophet—may Allāh honour and grant him peace—than the other, he should be favoured because he must know more.
iv. In case one of them was familiar with or connected to the story, then he should be favoured over the other who is a foreigner or stranger.
v. Of two reports, the one which has more transmitters should be favoured over the other [with fewer transmitters], even though some of our colleagues say it should not, just as a testimony should not be favoured with regard to its number; the first

[132] This statement is reported by al-Bayhaqī in his *al-Sunan al-Kubrā* (5: 9).

opinion is more correct, however, because the report of many people is more effective in shaping an opinion and less prone to oversight. This is why Allāh says in the *Qur'ān* (*al-Baqarah*, 2:282): *"Just in case one of the two women makes a mistake, then the other can remind her"*.
vi. Of two transmitters, the one who spent more time with the Prophet should be favoured than the one who spent less time, since he must be more familiar with continuous tradition.
vii. Of two transmitters, the one who clarified most the context or circumstances for the text or chain of the *ḥadīth* should be favoured for the extra attention he gives to it.
viii. Of two transmitters, the one who converted to Islam at a later time should be favoured [over the early converts] since he would have preserved the latest version from the Prophet—may Allāh bless him and grant him peace; likewise, the one who joined the rank of Companions at a later time, like Ibn 'Abbās and Ibn Mas'ūd, the later one to become a Companion is given precedence, although some of Abū Ḥanīfah's disciples disagree, saying that favour should not be based on juniority or posteriority, for the earlier one lived until the Prophet passed away, and therefore, was equal in terms of Companionship and even had the advantage of seniority; but, this opinion is not correct, because in spite of their being equal in terms of Companionship, the audition of the junior one took place at a later time, while that of the senior one could possibly have taken place at an earlier time or later, and therefore what is posterior with certainty is better; this is why ['Abdullāh] ibn 'Abbās says: "We choose the latest ones from the Prophet's deliberations".[133]
ix. Of two transmitters, the one who is more religious and more scrupulous in what he is reporting should be favoured;
x. Of two transmitters, the one whose word is consistent should be favoured, since making inconsistent reports is a sign of feeble memory.
xi. Of two reports, the one which is transmitted by the People of Medina should be favoured over the rest, since they must have learned the deeds of the Prophet—may Allāh honour and grant him peace—and the tradition he lived with until his death, and must know this better than others.

[133] See *al-Faṣl lil-Waṣl al-Mudraj fi al-Naql* by al-Khaṭīb al-Baghdādī (1:321).

[50]

PREFERRING A REPORT OVER ANOTHER

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i. Whenever there are two transmitters, one being senior and another junior, the senior's narration is to be favoured, because he is [probably] more meticulous (*aḍbaṭ*), which is why ['Abdullāh] ibn 'Umar favoured his own transmission concerning the issue of *ifrād ḥajj* [i.e. the Prophet's *ḥajj* being *ifrād ḥajj*] over that of Anas ibn Mālik, saying: "Anas was still a small boy playing with ladies who did not cover some parts of their bodies, when I took hold of the rein of the Prophet's camel and its saliva was dripping on me".[132]
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[133] See *al-Faṣl lil-Waṣl al-Mudraj fī al-Naql* by al-Khaṭīb al-Baghdādī (1:321).

xii. If one transmitter has varying reports, and another has not, then, according to some of our colleagues, two conflicting reports from a single transmitter should fall away, whereas the report from the other one [which is conflict-free] should remain. Yet, some scholars say that one of the reports from the transmitter with varying versions should be favoured on the basis of the report from the problem-free transmitter.

Now, with regard to the content (*matn*), the favouring (*tarjīḥ*) of one tradition over another is based on the following considerations:

i. If one *ḥadīth* is confirmed by an evidence from the *Qur'ān* or Prophetic tradition or legal inference, then this should be favoured over another that is not so.
ii. If one *ḥadīth* is put into practice by the leading authorities (*imāms*), then it should be favoured, because their practice indicates that it is the latest version and the better one; likewise, if a *ḥadīth* is put into practice by the people of the two Holy Lands (i.e. Makkah and Madīnah), it should also be favoured, since their practice shows that it has been established by the Sharī'ah and that they have inherited it [from the early generations].
iii. Of two *ḥadīths*, the one which comprises both pronouncement and implication should be favoured over the other which brings only one, because it is clearer.
iv. Of two *ḥadīths*, one giving a pronouncement and another giving an implication, the one which gives a pronouncement should be favoured over the other which gives an implication, because pronouncements are agreed upon, whereas implications are disputable.
v. Of two *ḥadīths*, one being verbal and practical and another is either such, the one which combines both word and action should be favoured, because it is stronger, owing to the appearance of both evidences, however, if one is verbal and the other practical; there are different positions which were discussed in the chapter on the deeds [of the Prophet].
vi. Of two *ḥadīths*, one being intended to be a ruling and another not meant to be a ruling, the one intended to be a ruling should be favoured, because it is much clearer in purpose and objective.
vii. Of two *ḥadīths*, one being due to some reason and another without any causal background, the one which is not due to any specific reason should be favoured, because its general implication is agreed upon, whereas the generality of that which is due to a specific reason is still disputed.

viii. Of two *ḥadīths*, the one which passes a judgment on the other should favoured, because it certainly must be prior.
ix. Of two *ḥadīths*, one being affirmative and the other negative, the one which is affirmative should be favoured, because it provides some extra-knowledge.
x. Of two *ḥadīths*, reporting (*nāqilan*) [i.e. bringing new information] and another simply confirming (*mubqiyan*) [the existing one], the former should be favoured, because it provides a legal ruling (*yufīd ḥukman shar'iyyan*).
xi. Of two *ḥadīths*, the one which sounds more cautious should be favoured over the other which does not, because when it comes to religion the one which is more careful is in a safer position.
xii. Of two *ḥadīths*, one suggesting prohibition and another implying permission, there are two opinions on this: first, both are equally valid, and second, the one which suggests prohibition should be favoured, which is the correct one, because it is a safer choice.

[51]

ON CONSENSUS: ITS MEANING AND VALIDITY

The word *ijmā'* literally has two meanings: (i) general agreement or consensus on something, and (ii) a serious decision or resolution to do something, e.g. one says: "I am determined to do it", using the verb *ajma'tu* in the sense of *'azamtu*. Technically, however, in religious context, the term refers to the agreement or consensus of the contemporary scholars concerning a case.

Section

Consensus is one of the valid proofs in religion and one of the legal evidences the implicitness of which is established. Whereas, according to [the Mu'tazilite scholar] al-Naẓẓām and the Rāfiḍite [Shī'ites], it is not a valid proof, others claim that consensus is impossible to take place and there is simply no way for us to know it. However, the argument for its possibile occurrence is that consensus is based on proofs derived either from a clear statement [in the *Qur'ān* or the *Sunnah*] or inference thereto, and those qualified are obliged to seek these proofs. And the reasons and circumstances that require them to strive their utmost to ascertain these proofs correctly are many; and so, it is possible for all of them to find the proof and agree on its legal entailment in the same way it is possible for many people searching for the crescent to see it and agree on its legal entailments of beginning the month of Ramaḍān and ending it. Now, in relation to their negation of the possibility of knowing consensus [even if it were to occur], the proof for the possibility of knowing a consensus is that it is valid to accept the reports of those who are present concerning those who are absent. And through those reports, we know their consensus, just as we know the religions of mankind despite their being dispersed in various countries and separated in different lands. Support for its judicial validity is found in God's saying: *"Whosoever opposes the messenger after the guidance [of God] has been explained unto him, and follows other than the believers' way, We shall appoint for him that unto which he himself has turned, and We shall expose him unto hell - a*

hapless journey's end!" (*al-Nisā'*, 4:115). Since to follow other than the way of the believers is punishable, it is clear that to follow their way is obligatory, and to go against it is prohibited. Another support comes from the Prophet's saying, *"My people will not concede to blunder"* and, on another report, *"My people will not agree on error"*, as well as his saying, *"Whosoever separates from the [Muslim] community even a span, has truly removed the ligament of Islam off his neck"*. The Prophet—may Allāh honour and grant him peace—also prohibits deviation, saying, *"Whosoever deviates, is departing to hell"*. All this points out the necessity of accepting consensus.

Section

Consensus is a valid proof from the Sharī'ah's point of view, although some people are of the opinion that it is a valid proof both from the Sharī'ah point of view as well as from the standpoint of reason, which is not correct, since reason does not rule out the possibility of many people agreeing on error, such as the case of the Jews and the Christians who in spite of their large number have agreed on disbelief and confusion. Therefore, consensus is not a valid proof from the standpoint of reason.

[52]

ON THAT BY WHICH CONSENSUS IS ACHIEVED AND THAT WHICH IS MADE EVIDENCE THEREIN

You should know that consensus does not take place unless there is proof for it. So, if you find their consensus on a certain ruling, we can infer that there must be some proof that has made them unanimous, whether we know it or not. Consensus may also occur on the basis of any proof that supports a ruling, including rational proofs as well as textual proofs derived from the *Qur'ān* and the *Sunnah* and the implications thereof, and also from the deeds and decisions of the Prophet—may Allah bess him and grant him peace—and from juristic analogy and all kinds of legal inferences. However, Dāwūd [al-Ẓāhirī] and Ibn Jarīr [al-Ṭabarī] argue that consensus cannot be achieved through juristic analogy. Dāwūd's view is based on his rejection of analogy as a valid legal proof, to which we shall return shortly—God willing, whereas Ibn Jarīr's view is erroneous since analogy is one of the valid proofs of Sharī'ah and therefore it is possible for consensus to be achieved through analogy, just as it can be derived from the *Qur'ān* and the *Sunnah*.

Section

Consensus is a valid proof for all legal rulings, like the rituals, social and economic transactions, and criminal offenses involving bloodshed, and sexual relations, and everything else that is lawful and unlawful, including legal opinions and judgments.

As for rational judgment, there are two kinds of rational judgment: First, that the validity of which must be ascertained prior to knowing the validity of Sharī'ah, such as [rational judgment concerning] the creation of the world and the existence of Creator and His attributes, the proof of prophecy, and the like, in which case consensus cannot be a valid proof since, as explained earlier, consensus is a legal proof that is established by revelation and therefore cannot establish something that is known prior to

revelation, just as the *Qur'ān* cannot be established by the *Sunnah* when the *Qur'ān* must be given priority over the *Sunnah*.

Second, that, which knowing it prior to revelation is not a necessity in order for it to be known, such as the possibility of seeing God and His forgiveness towards the sinners, and the like, which can be known following revelation; it is on these matters that consensus can be a valid proof, since they can be learned after the Sharī'ah, and consensus is one of the proofs of Sharī'ah.

Consensus cannot be a valid proof for mundane matters such as preparation of army, management of wars, urban development, agriculture, etc. which belong to worldly benefits. This is so because, when it comes to these matters, consensus is not more numerous than the sayings of the Prophet—may Allāh honour and grant him peace. Besides, it is established that the Prophetic sayings are valid proofs in Sharī'ah-related consensus only, not in matters with mundane benefits. Indeed, it is reported that the Prophet—may Allāh honour and grant him peace—once stopped by at a certain place which he left when he was told that it was not a good opinion.

[53]

THAT THROUGH WHICH CONSENSUS IS KNOWN

You should know that consensus is known either through pronouncement and practice, by ponouncement and approval, or through an action and endorsement. A verbal consensus (i.e. one known by pronouncement) occurs when everyone expresses the same opinion about something, e.g. when they all say that *x* is permissible or it is forbidden.

A consensus that is known through practice happens when they all do the same thing. As to the stipulation "with the disappearance of the whole generation" *(inqirāḍ al-'asr*—that is, when the scholars who took part in the consensus have all passed away), our [Shāfi'ite] colleagues hold two views; some of them put it so that consensus is not achieved if the entire generation have not passed away and therefore cannot be a binding proof, while some others maintained that the consensus is said to be concluded even if the whole generation have not all passed away, which is the correct opinion, supported by the saying of the Prophet—may Allāh honour and grant him peace, *"My people will not agree on error"*, because he, whose word is considered a valid proof, like the Prophet, his death is not a condition for the validity of it being a proof.

Consequently, if we take it as a consensus, and the Companions agreed on a statement even though not all of them have passed away, then none of them can retract his consent. Furthermore, if some of the junior Companions were later to grow up and become independent scholars after a consensus had been achieved, their [i.e. the junior Companion's view] is to be ignored as the latter cannot oppose [the consensus of the rest of the Companions]. Now, if we do not take it as a consensus and make the stipulation "with the disappearance of the whole generation", then it is allowed for some of them to retract their consent, and—as in the case of a junior Companion who later grew up and became an independent scholar—to oppose the consensus of the rest.

Section

As for consensus by words and endorsement, it is achieved when some of them expressed an opinion which became widespread and known to the rest who did not say anything against it. On the other hand, a consensus by action and endorsement is said to happen when some of them did something with which the others had direct contact remained silent and did not denounce it; the [Shāfi'ite scholars'] hold that it is a binding proof, being a consensus after the whole generation have all passed away.

Al-Ṣayrafī regards it a binding proof though it is not called *ijmā'* (consensus), while Abū 'Alī ibn Abī Hurayrah says that if it was a *fatwā* of a jurist and they did not say anything about it, then it becomes a binding proof; but if it is a decision of a political leader or a judge, then it cannot become a binding proof. [The Ẓāhirite] Dāwūd said that it is neither a binding proof nor *ijmā'*. Our argument for the position we hold is that usually those independent scholars whenever they heard something in response to an event they would do their own thinking and express their own judgment, but since they did not show any opposition, we can say that they accepted it. As for before the disappearance of the entire generation, the [position of Shāfi'ī School] has been transmitted in two ways; some of our colleagues transmitted a single view, and that is that it is not a legal proof, while others transmitted two views (i.e. a difference of opinions in the school), like the two views concerning consensus through words and action.

[54]

WHICH CONSENSUS IS AND IS NOT VALID AND WHOSE OPINION IS AND IS NOT CONSIDERED

You should know that the consensus of all nations except that of this community is not a binding proof. But some people say that the consensus of each community is a binding proof, which is the opinion of Master Abū Isḥāq al-Isfarāyīnī, though we can show its absurdity by saying that consensus is a binding proof in religious matters only, and the Sharī'ah guarantees only the infallibility of the Muslim community. Therefore, it is possible for other [non-Muslim] nations to fall into error.

Section

As for the Muslim community, the consensus of scholars in a particular period is a binding proof to the subsequent generations, although Dāwūd said that the consensus of people other than the Companions of the Prophet is not a binding proof. Our position is supported by God's saying in the Holy *Qur'ān*, *"Whosoever opposes the messenger after the guidance [of Allah] has been manifested unto him, and follows other than the believer's way, We appoint for him that unto which he himself has turned, and expose him unto hell - a hapless journey's end!"* (*al-Nisā'*, 4:115), which applies to all, and [is supported by] the Prophet's saying, *"No age is devoid of someone who stands for Allah with proofs"*, and by the fact that it must represent the agreement of contemporary scholars on the ruling of certain event. Therefore, they are just like the Companions in this regard.

Section

In order for consensus to be valid, it must truly reflect the unanimous opinion of all scholars in a given period. Thus, if some of them—no matter how few they are—express their disagreement, it cannot be considered as consensus. Ibn Jarīr maintains that it becomes a consensus, if the opposition comes from only one or two scholars.

Some people say, however, that it all depends on the number of the participants; if those who disagree are fewer than those who agree, then their disagreement does not count. Another opinion says that if those who disagree are people whose information does not afford knowledge, then it should be disregarded. Some others propose that if the inhabitants of the two Holy Cities, Makkah and Madīnah, and two provinces, Baṣrah and Kūfah, are unanimously agreed, then, the opposition of the rest does not count. According to Mālik, the consensus of Madīnah people is enough to rule out the rest. Yet, al-Abharī [i.e. Abū Bakr Muḥammad ibn 'Abdillāh al-Tamīmī, teacher of al-Dāruquṭnī], for among Mālik's followers that Mālik meant by this: what comes through information such as charity for the public and volume measurement unit, while his other colleagues say that it means favouring what they [i.e. the people of Madīnah] have reported. Still, others hold that he meant: consensus during the time of the Companions, the Successors, and the subsequent [third] generation only. Some jurists say that if the four caliphs—may God be pleased with them—have unanimously agreed, all oppositions are to be ignored, the Rāfiḍite [i.e. Shī'ites] hold that if 'Alī ibn Abī Ṭālib—may God be pleased with him—has stated his view, the rest may be ignored. To prove the absurdity of all these opinions, we need only recall that God tells us to follow only the path of all believers, which means that it is possible for some to disagree, while the Prophet—may Allāh honour and grant him peace—affirms only the exclusion of the whole [Muslim] community from falling into error, thereby implying the possibility of mistake on the part of some.

Section

Again, in order to be valid, consensus must be concluded by all scholars who are capable of independent judgment (*ahl al-ijtihād*), regardless of whether they are renowned or not, reliable or morally corrupt, since what counts is their scholarly competence, so that they are all treated equally in this regard.

Section

It does not matter whether the competent scholar belongs to their generation or the subsequent one, whereby he becomes a scholar when the event took place, as in the case of a Successor who lived during the time of some Companions of the Prophet when the event

occurred. Yet, some of our colleagues disregard the view of a Successor in the presence of the Companions. To support our position, we refer to Sa'īd ibn al-Musayyab, al-Ḥasan al-Baṣrī, and the disciples of 'Abdullāh ibn Mas'ūd, including Shurayḥ [ibn al-Ḥārith], al-Aswad [ibn Yazīd], and 'Alqamah [ibn Qays], who expressed their own judgment when the Companions were still alive, and none of the latter opposed them, since they were qualified to do so and therefore they were treated like the junior Companions and their views taken into consideration.

Section

However, should anyone deviate from the religion, with or without interpretation, then say something about an issue, his view will not be counted; unless he becomes Muslim and becomes qualified to make scholarly judgment. But, if the consensus was reached while he was still an infidel, and later he converted to Islam and became a scholar, then his view will be either disregarded—if we do not stipulate the passing away of the whole generation- or will be counted—if do impose such a condition- in which case his disagreement will render the consensus invalid.

Section

As regards those who are not capable of independent judgment on legal matters, such as the lay people, the theologians *(mutakallimūn),* and the *uṣūliyyūn,* their views will not affect the consensus. Some theologians say that the opinion of the lay people should also be reckoned, whereas others suggest that the opinion of theologians and *uṣūliyyūn* be taken into account. But this is not right, because the lay people do not know how to make *ijtihād,* and so they are like children, whereas the theologians and *uṣūliyyūn* do not know all the methods of jurisprudence, just like the *fuqahā'* who do not know *uṣūl al-fiqh.*

[55]

CONSENSUS AFTER DISAGREEMENT

If the Companions had two different views over an issue and the whole generation have passed away, the Successors may agree on either one of them. Some of our colleagues say, however, that it is inconceivable since differing views is a proof that one may adopt any one of them, which indicates that they cannot be both wrong, while the consensus of Successors on the invalidity of one of them is also a proof, which cannot be wrong either; thus, two proofs cannot both occur at once. This is incorrect, because if the Companions have permitted us to take either one of the two views and the Successors say one of them is incorrect, they are in that regard just a segment of the Community, and a segment [as oppose to the whole] can agree on error.

Section

If the Successors unanimously agree on one of the two opinions that does not eradicate the difference between the Companions. And it is permissible for the subsequent generation to adopt either one of the two opinions. Ibn Khayrān [Abū 'Alī al-Ḥusayn ibn Ṣāliḥ al-Baghdādī] and al-Qaffāl [Abū Bakr Muḥammad ibn 'Alī ibn Ismā'īl al-Shāshī] say that the dispute is over and the matter is considered settled by consensus. And this is the Mu'tazilite view. Our position is supported thus by the fact that they had two different opinions *is* their consensus on the permissibility to adopt either one of the two opinions, and whatever the Companions have unanimously permitted cannot be simply banned by the consensus of the Successors. Similarly, whatever the former have unanimously declared lawful cannot be simply forbidden by the consensus of the latter.

Section

If the Companions used to have two different views and later agreed on one of the two, then we must look into the matter; if it happened before the dispute cooled down and settled—such as the opposition of some Companions to Caliph Abū Bakr's decision to wage war

against those refusing to pay the alms tax (*zakāt*) and their subsequent consent—then the dispute was over and the matter became a consensus without doubt; if, however, it happened after the dispute had cooled down and was settled, then it will depend on the position we take; if the consensus of the Successors eliminates the difference of the Companions then the consensus of the Companions themselves is prior to eliminating their difference; but if we say that their consensus does not eliminate the difference of opinion between the Companions, then the matter is decided on the basis of the "passing-away-of-the-entire-generation principle".

That is to say, if we hold that this principle determines the validity of consensus, then it is possible [for them to reach a consensus], because their disagreements are not more frequent than their agreement, so that if they might pull back their consent before the entire generation disappeared, it would be all the more possible for them to withdraw their opposition.

On the other hand, if we do not stipulate such a condition, then it is impossible for them to arrive at a consensus, because their disagreement is a binding proof, which cannot be wrong, in allowing the adoption of either one of two opinions, and therefore, it is not possible for them to agree to discard a proof that is immune to error.

[56]

TWO DIFFERING VIEWS OF THE COMPANIONS

You should know that when the Companions had two different opinions and their entire generation passed, the Successors were not allowed to agree on a third opinion. Some Ẓāhirites think they may do so, which is evidently incorrect because their differing opinions is a consensus that invalidates any other opinion, just as their consensus on the opinion of each person is a consensus annulling any other opinions. Moreover, just as it is not allowed to issue an alternative opinion to the one which they have unanimously agreed upon, it is not allowed to propose a third opinion as alternative to the two opinions which they have agreed upon.

Section

If the Companions had two different opinions concerning two different cases, whereby some of them opted for the permissibility of both and some others favoured the prohibition of both, without explicitly declaring the similarity of both cases from a legal point of view, then a Successor may adopt one opinion concerning one case and another, different opinion concerning the other, that is to say, opting for permissibility in one case and preferring prohibition in another. For some scholars, this means producing a third opinion, which is not true, because the Successor did in fact agree on each one of the cases with some of the Companions. Yet, if the Companions [who had two different opinions concerning two different cases] explicitly declared the two cases to be similar, whereby some of them ruled that both were unlawful and some others judged both to be lawful, then it is not permissible for the Successor to opt for one in one case, and another, in the other. Our teacher al-Qāḍī Abū al-Ṭayyib [Ṭāhir ibn 'Abdillāh al-Ṭabarī]—may God have mercy on him—said that it may be allowable to do so, because there was no consensus regarding the similarity of both cases from a legal point of view. But the the correct opinion is the first one, because a consensus did occur among the Companions concerning the declaration of the

similarity of both cases and, therefore, declaring them dissimilar is going against the consensus, which is not allowed.

[57]

OPINION OF SINGLE COMPANION AND SOME OF THEM FAVOURING ONE POSITION OVER ANOTHER

If an opinion expressed by a Companion was neither circulated among the scholars nor met with any known opposition from them, it was not a consensus. But, is it a binding proof or not? There are two views [by al-Shāfi'ī] on this issue; [al-Shāfi'ī] in his early position, it is a binding proof that must be given preference over analogical reasoning—a view that is also held by many jurists and even shared by [the Mu'tazilite] Abū 'Alī al-Jubbā'ī. However, in his later position [al-Shāfi'ī] says that it is not a binding proof, which is the correct one.

The disciples of Abū Ḥanīfah, on the other hand, say that if it contradicts analogical reasoning, then it is something determined (*tawqīf*) which must be preferred to analogical reasoning. They refer to the opinion of Ibn 'Abbās—may God be pleased with him—concerning someone who vowed to sacrifice his son, as well as to the opinion of 'Ā'ishah concerning Zayd ibn Arqām's deal [in slave trade], and other cases.

It cannot be a binding proof because God Almighty simply commands us to follow all the faithful, which therefore means that it is not compulsory to follow just some of them. Also, it [is not a binding proof because it] is the opinion of one scholar who may be wrong and, so, like the opinion of the Successors, it is not a proof. Yet, it is not something determined (*tawqīf*) either, because if it were so, then it would have been transmitted at one time or another from the Prophet—may Allāh honour and grant him peace, but it was not, and therefore it is not *tawqīf*.

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If we accept his [i.e. al-Shāfi'ī's] early opinion that it is a binding proof, then it must be preferred to analogical reasoning, and the Successors are bound to implement it and are not allowed to oppose it. But, does it specify the general? There are two views on this: first is that it renders the general specific, because being preferred to

analogical reasoning, to specify the general would be more appropriate; secondly, it does not do so, since they used to return to generality and abandon their own positions, therefore, specification by an individual position among the Companions is impossible. However, if we say that it is not a binding proof, then analogical reasoning should be preferred to it and a Successor is allowed to oppose it, though according to al-Ṣayrafī, if he has [an opinion based on] a weak analogical reasoning, then his opinion that is coupled with a weak analogical reasoning is preferable to a strong [but mere] analogical reasoning. But this view is not correct because neither his opinion nor a weak reasoning is a binding proof, and therefore, it is not allowed to abandon strong analogical reasoning, which is a binding proof, for the combination of two of them [neither of which is a binding proof].

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If they [i.e. the Companions] have two different opinions, then it must be [decided on] the basis of these two whether or not it is a binding proof. If we say that it is not a binding proof, then the opinion of some of them is not binding on the rest, in which case we would not be allowed to follow either one of the two, but rather we would have to return to the evidence at hand. Yet, if we regard it as a binding proof in both cases, then the two would be contradicting each other, which would result in the favouring of one of them over the other by looking at the number [of supporters]; the one with more supporters from his peers should be favoured over the one with less supporters. This is in accordance with the Prophet's saying, *"You should be with the vast majority ('alaykum bi al-sawād al-a'ẓam)"*.[134] If they both have equal number of supporters, then we should prefer the one supported by prominent figures *(al-a'immah)*. This is in line with the Prophet's advice: "You should follow my tradition as well as the tradition of the righteous successors after me (*'alaykum bi-sunnatī wa sunnat al-khulafā' al-rāshidīn min ba'dī*)".[135] Yet, if the one with more supporters does not include any prominent figure, whereas the other one with fewer supporters includes a prominent figure among them, then both will have equal worth, as the former is numerically

[134] Narrated by Ibn Mājah (3950).

[135] Narrated by Aḥmad (4: 126), Abū Dāwūd (4608), Ibn Mājah (42), and al-Tirmidhī (2676).

superior, while the latter is backed by an *imām*. Now, if they both have equal number of supporters and include among them prominent figures such as one of the two chiefs [i.e. Abū Bakr or 'Umar], then there are two views: first is that they both are of equal worth because the Prophet—may Allāh honour and grant him peace—has declared thus: *"My Companions are like stars; whomever you follow, you will be rightly guided"*;[136] a second view says that the one with one of the two chiefs among its supporters should be given preference, because the Prophet has specifically mentioned their names: *"You should follow those after me, namely, Abū Bakr al-Ṣiddīq and 'Umar ibn al-Khaṭṭāb"*.[137]

[136] Narrated by Ibn 'Abd al-Barr, *Jāmi' Bayān al-'Ilm* (2:90).

[137] Narrated by al-Tirmidhī (3663), Ibn Mājah (97), Aḥmad (5:382), and Ibn Ḥibbān (6902).

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DEFINITION OF JURISTIC INFERENCE (*AL-QIYĀS*)

You should know that 'juristic inference' (*qiyās*) is linking the 'branch' (*far'*, i.e. a new case) to the 'root' (*aṣl*, i.e. the precedent) whereby some of the rulings concerning the latter are applied to the former by virtue of a common legal determinant (*ma'nā*) that links both of them together. Some of our scholars say that *qiyās* is a signal that is used as a basis of judgment, while others say that it is what the inferer (*al-qā'is*) does. Still, others say that *qiyās* is to make a judgment or decision using one's own discretion (*ijtihād*). But [of all these], the first definition is the correct one, as it is consistent and reciprocal (*yaṭṭarid wa-yan'akis*), for you can see that *qiyās* exists whenever it[138] exists, and no longer exists once it is gone. As for *qiyās* being a signal, it [i.e. this definition] does not have such implication; Don't you see that the decline of the sun[139] is a signal that it is time for the noon prayer, and yet this is [just an indication] not a juristic inference. Still, [to define *qiyās* as] a comparer's act is simply meaningless, for if it were true, then [by implication] whatever the comparer does would have to be called *qiyās*, such as walking and sitting, but this is something nobody would say and so it is an absurd definition. As for *ijtihād* [being used to define *qiyās*], this has a broader sense than *qiyās*, since *ijtihād* refers to the effort made [by a jurist] to derive a ruling [from the *Qur'ān* and the *Sunnah* by means of reasoning], which includes bringing the absolute to bear on the relative, and subsuming the general under the specific, and all other means through which a ruling [or judgment] may be derived, of which some are not *qiyās*. Therefore, *qiyās* cannot be defined as *ijtihād*.

[138] That is applying a similar judgment to two different cases due to some common reason.

[139] That is the time when the sun crosses the local meridian or shows the first sign of its decline from midday (*zawāl al-shams*).

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ESTABLISHING JURISTIC INFERENCE AND THAT FOR WHICH IT CAN BE MADE AN EVIDENCE

In general, we may assert that juristic inference is a valid argument (*ḥujjah*) for establishing rational judgments and is one of its means, such as [judgment about] the createdness of the world, the existence of the Creator, etc. Some people deny this, but they are wrong because such judgments are established either by logical necessity (*bil-ḍarūrah*) or by rational argument (*bil-istidlāl*), and because juristic inference is not [established] by logical necessity, for otherwise, all rational beings would not have had any disagreements over it. This shows that those [judgments] are established by means of juristic inference and "proof of the absent from the present" (*al-istidlāl bil-shāhid 'alā al-ghā'ib*).

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Juristic inference is a valid argument for religious matters too, as it serves as a means to knowing the [Divine] law, as well as one of its proofs from a Sharī'ah point of view. Abū Bakr al-Daqqāq says, as one of the means [to knowing the Divine law], juristic inference should be put into use—both logically and religiously [and not only from a Shari'ah point of view]. However, al-Naẓẓām along with the Shī'ites and the Mu'tazilites of Baghdad[140] say that juristic inference is not a means to [knowing] Sharī'ah law, nor is it permissible to establish a religious duty based on it (*ta'abbud bihi*), from a rational perspective. While, Dāwūd and other Ẓāhirites say that despite its permissibility from a rational perspective, the Divine Law has warned against and forbade it.

The argument for the non-obligatoriness of using analogical inference, from logical perspective is, [for example]: the prohibition

[140] They are: Abū Ja'far Muḥammad ibn 'Abdillāh al-Iskāfī (born in Samarqand and died in Baghdad in 240 AH), Ja'far ibn Ḥarb (born in Hamadhan and died in Baghdad in 226 AH), and Ja'far ibn Mubashshir ibn Aḥmad al-Thaqafī (died in 234 AH).

of inequity in exchange [between two ribawī items] being contingent in [them being sold according to] measurement units, or them being food items[141] is not prior to non-prohibition, as far as rationality goes. For this reason, the Sharī'ah may stipulate for it one ruling instead of the other, and since both are equally possible, rationality cannot give one precedence over the other.

As for the permissibility of performing a religious duty on the basis of it [i.e. *qiyās*] from logical point of view, [we argue that] since a legal judgment may be passed on something based on a clearly stated legal reason (*bi-'illah manṣūṣ 'alayha*), it may also be passed on the basis of an implicit legal reason (*bi-'illah ghayr manṣūṣ 'alayha*) whereby a proof is adduced to arrive at such judgment. Don't you see that just as a person who sees the *qiblah* [i.e. the Ka'bah] may be commanded to face it, so a person who does not see it may be told to do the same by means of a proof that leads to it.

The Sharī'ah too does validate it, and its use is compulsory. This is indeed supported by the consensus of [the Prophet's] Companions. For it is reported that Abū Bakr al-Ṣiddīq—may Allah be pleased with him—whenever confronted by an issue would look into the Book of Almighty Allāh and the *Sunnah* of the Prophet—may Allāh honour and grant him peace—and if he found nothing there, he would summon the leading jurists to seek their opinions, so that he would base his decision on their agreement.[142] Similarly, Caliph 'Umar—may Allāh be pleased with him—in an authentic letter addressed to Abū al-Mūsā al-Ash'arī—may Allāh give him mercy—said, "Try to grasp, try to grasp what is relevant to you from the *Qur'ān* and the

[141] The Prophet—may Allāh honour and grant him peace—prohibited the sale of gold for gold, silver for silver, wheat for wheat, dates for dates, salt for salt, except if the exchange is mutually equitable, hand-in-hand, and no part of the exchange is delayed from the time of the sale agreement. Subsequently, the scholars differed concerning the legal determinant for this specific prohibition in these specific items. According to the Ḥanafite and Ḥanbalite Schools, the legal determinant is the fact that these items are sold by measurable units. The Shāfi'ite School, separated the items; the legal determinant in the case of gold and silver is the fact that they were the basis of the money-value system of old, and the legal determinant in the other items is the fact that they were food items. These two positions are what the author referred to here.

[142] This tradition is found in Mālik, *al-Muwaṭṭa'* (2:513), Abū Dāwūd, *Sunan* (2894), al-Tirmidhī, *Jāmi'* (2100 and 2101), al-Nasā'ī, *Sunan* (6339-6346), Ibn Mājah, *Sunan* (2724), Aḥmad, *al-Musnad* (4: 225), and al-Ḥākim, *al-Mustadrak* (4:376).

Sunnah that is not [stated] there, and then you may draw analogies between things".[143] He [i.e. 'Umar] reportedly said to 'Uthmān—may Allāh be pleased with him—"I have my own opinion concerning grandfather [as being more entitled to inheritance than brothers], so just follow me", to which 'Uthmān replied, "We may follow you since you have a sound opinion, but we may also follow the opinion of someone before you who is certainly the best one."[144] 'Alī—may Allāh honour him—once said, "The opinion which I and Caliph 'Umar—may Allāh be pleased with him—used to hold was that slave women who have given birth to children [as a result of intercourse with their masters] should not be sold. But now, in my opinion, they may be sold", to which 'Abīdah [ibn 'Amr] al-Salmānī replied, "The opinion of two reliable persons is dearer to us than the opinion of yours alone—or, according to another report, than the opinion of one single authority".[145] All this clearly shows the permissibility of using juristic inference.

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Juristic inference is useful to establish all Sharī'ah rulings, the general as well as the specific, those pertaining to penal sanctions, expiatory acts, and their portions or limits. Abū Hāshim[146] is of a different opinion, however, saying that juristic inference does not establish anything except giving details of what is stated by the [Sharī'ah] texts, and it is not allowed to establish general rules which are not stated in the text; e.g. the inheritance of a brother cannot be positively affirmed through juristic inference, although if the text says so it can be affirmed along with that of the grandfather by way of analogy. Yet, according to the disciples of Abū Ḥanīfah, juristic inference cannot have power to decide penal sanctions, expiatory acts, and portions or limits thereof, such as determining the rates of various *zakāt* and the times of different prayers. This is the view of al-Jubbā'ī too, while some other scholars say that all this may be determined by means of

[143] Reported by al-Dāraquṭnī, *Sunan* (4:207) and al-Bayhaqī, *Sunan* (10:115).

[144] The story is recorded in al-Dārimī, *Sunan* (2:345), 'Abd al-Razzāq, *Muṣannaf* (19051), al-Ḥākim, *al-Mustadrak* (4:340), and al-Bayhaqī, *Sunan* (6:246).

[145] As reported in 'Abd al-Razzāq, *Muṣannaf* (132240) and al-Bayhaqī, *Sunan* (10:343) and (10:348).

[146] He is Abu Hāshim 'Abd al-Salām ibn 'Abi 'Alī Muḥammad ibn 'Abd al-Wahhāb al-Jubbā'ī, a famous Mu'tazilite scholar, who died in 321 H. in Baghdad.

deductive resoning *(bil-istidlāl)* instead of juristic inference *(dūn al-qiyās)*. Now, in support of our view we say: if the [above-mentioned] rulings may be established by individual statements (*khabar al-wāḥid*), then, like the other [Sharī'ah] rulings, they may also be established by means of juristic inference.

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With regard to names and languages, whether or not they can be established by juristic inference, there are two opinions; the correct one is that which says they can, as we have explained earlier at the beginning of this book.

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As for matters that are known by physical norms or physical nature, such as the minimum and maximum period of menstruation, post-natal discharge, and pregnancy, there is no room for juristic inference. This is so because the essence of these matters is known only through individual statement of reliable persons (*khabar al-ṣādiq*). The same is true of matters knowable through traditional learning and audition (*al-riwāyah wal-samā'*), e.g. the Prophet's way of performing *ḥajj* and *'umrah* at the same time with one single *iḥrām* and separately one after the other, the Prophet's entering Makkah [during the reconquest] peacefully or forcibly; all this cannot be established by juristic inference.

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THE VARIETIES OF JURISTIC INFERENCE

The Prominent Shaykh—may Allāh illuminate his grave and bring chills to his tomb—says: In the book entitled *al-Mulakhkhaṣ fī al-Jadal* (Compendium on Disputation) I have already mentioned and explained the various types of juristic inference which I shall repeat here for our purposes in this book—God willing. I begin now—with God on our side- by saying thus:

Juristic inference is of three kinds: [i] causal inference (*qiyās 'illah*), [ii] indexical inference (*qiyās dalālah*), [iii] analogical inference (*qiyās shabah*). The causal inference is to relate the 'branch' to the 'root' by virtue of some evidence upon which the legal ruling of Sharī'ah is based. Such [basis] could be something in which the underlying wisdom becomes manifest to the independent jurist, such as the negative effect of wine *(khamr)*, which includes distraction from remembering Almighty Allāh and from prayer; but it could also be something, the wisdom behind which Allāh keeps to Himself, such as foodstuff and sale-by-measurement-units in the prohibition of usury (*ribā*).[147] This type of causal inference is subdivided into two kinds: the plain (*jaliyy*) and the vague (*khafiyy*). The plain one is that which suggests one meaning only and one whose legal reason is established through a clear-cut proof which leaves no room for [alternative] interpretation.

Of its many kinds, the most plain one is that in which the causal phrase is stated explicitly, such as in the Qur'ānic verse: "So that it will not circulate between the wealthy among you" (*al-Ḥashr*, 59:7), and in the Prophet's *ḥadīth*: *"I only prohibited you [from storing the meat of sacrificial animals] on account of the caravan"*, where the reason [for the ruling] is made plain. Another kind is by indirect allusion *a fortiori* (*min jihat al-awlā*), such as in the Qur'ānic verse: *"Say not to them a word of contempt"* (*al-Isrā'*, 17:23), whereby it is pointed out that physical abuse is *a fortiori* prohibited; likewise the Prophet's prohibition of slaughtering the one-eyed animal as a sacrifice, which

[147] This is referred to as *ribā al-faḍl* whereby one party demands an additional increase to the counter-value. For example, one party gives something worth 100 in exchange for something worth 110.

indicates that the blind animal is *a fortiori* prohibited to be sacrificed. Moreover, there is a kind [of plain, causal juristic inference] in which the meaning of the expression [of the ruling] is not understood *a fortiori,* such as the Prophet's prohibition of urinating in still water and [his] command to throw away the melting butter if a dead rat has fallen into it; from this statement one can understand that blood is [to be treated] like urine, and sesame oil like butter.

In the same vein, all legal reasons deduced [from the revealed texts] which all Muslims agree upon are considered as plain [i.e. *qiyās jaliyy*], such as their consensus about the penal code (*ḥadd*) being meant for prevention and suppression of crimes against God, and [their consensus about] reduction of sanctions imposed on slaves due to their status as compared to free people. This kind of inference does not carry except one meaning, so that the ruling of a judge will be nullified if it contradicts the former, just as it will be rendered invalid if it goes against the text [i.e. the *Qur'ān* and the *Sunnah*] and the consensus [of the Muslim community].

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The vague one [i.e. *qiyās khafiyy*] is that which suggests [more than one meaning] and one that is established through an implicit method. It too is of many kinds, some of which are more apparent than the others. The most apparent of them is based on a clear indication, such as foodstuff usury, the prohibition of which is known to us through the Prophet's ban on selling basic food items [with excess taken in exchange of the same item] stated in the *ḥadīth*: *"Do not trade a food item for another [similar] food item except equal for equal"*.[148] Since the prohibition is tied to foodstuff, it is clear that it should be the juristic reason *('illah)*. Another example is the case of Barīrah [a slave woman] who had been set free while her husband was still a slave; the Prophet—may Allāh honour and grant him peace—told her to choose [either to remain married to her husband, *Mughīth*, or not]. It is clear that she was given the option because her husband was still a slave. Next [in terms of its apparency] is that which is known by deduction (*bil-istinbāṭ*) and is indicated by the effect it has, such as the inebriating intensity found in wine [i.e. its intoxicating effect]; now since the ban is either put or lifted depending on the existence or

[148] The *ḥadīth* is narrated by Muslim in his *Ṣaḥīḥ*, "Kitāb al-Musāqāh, Bāb Bay' al-Ṭa'ām Mithlan bi-Mithl (1592).

non-existence of this intense quality, it must be clearly the legal reason (*'illah*). This kind of inference is probabilistic because it is probable that being food is only an essential legal meaning[149] in relation to wheat,[150] as it is probable that it is an essential legal meaning in all edible items [mentioned in the text], but [even with that being the case, it is possible that] the prohibition of inequitable exchange (*ribā*) of these items is due to a reason other than them being food. Similarly, the *ḥadīth* of Barīrah suggests that the options might have been to her due to her husband's status but it also suggests it might have been because of something else as the mention of her husband's status could be simply for identification. By the same token, in the case of wine, the prohibition could be due to its intoxicating effect but it could also be due to the very appellation '*khamr*' itself since it is so-called because of the intense effect [that it produces] and may not be so-called once the effect is gone. For the likes of this, the ruling issued by a judge cannot be nullified.

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The second type of juristic inference is called *qiyās dalālah* (indexical inference). It is when the 'branch' [i.e. the new case] is compared to the 'root' [i.e. the previous case] by virtue of something other than that on which the Sharī'ah ruling is based, while pointing out the existence of the Sharī'ah cause [for the ruling]. This [type of inference] is of several kinds: [i] to argue for a ruling from some characteristic features of an existing rule [i.e. precedent], such as inferring the non-obligatoriness of prostrating for reciting certain verses of the *Qur'ān (sujūd al-tilāwah)* from the permissibility of doing it while on a ride; for, the fact that it may be performed while on a ride means that it belongs to the category of non-obligatory deeds. Another kind is [ii] to infer a legal ruling from another similar ruling such as our saying about the almsgiving duty (*zakāt*) imposed on the wealth of an infant; that since one tenth (1/10) is due on his crops *zakāt* is also obligatory on his money, the same way it is obligatory on the money of an adult (*bāligh*), and such as our view concerning a non-Muslim living under Muslim rule and protection in Muslim lands *(dhimmī)* who committed *ẓihār* [i.e. telling his wife: "You are to

[149] What is meant by legal meaning is a meaning that affects legal rulings, or upon which legal rulings are based.

[150] Among the items mentioned in the *ḥadīth* of *ribā*.

me like the back of my mother"],[151] that since his divorce is valid, so too is his *ẓihār*. Here, the ruling is issued concerning four tenths (i.e the amount of *zakāt* due on money) is inferred from the ruling of one tenth (i.e. the amont due on crops), and concerning the validity of *ẓihār* in comparison to divorce (*ṭalāq*), because both are analogous (*naẓīrāni*) so that one case is an indexical proof of the other. While this type of inference may appear like the tacit causal inference in terms of its implication, it could be classified as the obvious causal inference if the basic reason is widely accepted, pertaining to the abolition of a ruling issued by a judge.

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The third type [of juristic inference] is *qiyās al-shabah* (analogical inference). It is to relate the 'branch' [i.e. the new case] to the 'root' [i.e. the precedent] due to some kind of similarity. For instance, the new case may switch between two precedent cases in that it resembles one of them in having three common features while resembling the other one in having two common features. The new case is thus linked to the one with more similar features. Consider the case of a slave who resembles a free man in his being human, addressed by God, entitled to reward and punishment, but also resembles the cattle in being held as property and subject to purchase, sale, etc. or the case of *wuḍū'* [i.e. ablution with water] which resembles *tayammum* [i.e. dry ablution using dust] in that it requires declaration of intention as it is purging one of impurity, but also resembles cleansing filth as it is removing impurity using some liquid and so it is to be put under the category of what it more closely resembles. Our scholars disagree on this; some of them say that it is correct [to do so] because al-Shāfi'ī has said something to that effect, while some others say it is incorrect [to do so], explaining away what al-Shāfi'ī said to mean that he actually prefers the causal inference when similarities abound. Now, those advocating this type of inference are also divided; some say that the resemblance by which the 'branch' is linked to the 'root' must be a legal ruling while others say it can be either a legal ruling or a common feature. Yet, the leading master

[151] *Ẓihār* was a type of divorce in pre-Islamic Arabia. One would announce his desire to divorce his wife by comparing her to his mother, which essential meant that he now choses to view marital relations with his wife in the same way he does with his mother, i.e, it cannot happen. Islam maintained this type of divorce albeit with different, Islamic legal regulations.

[i.e. the author of this book]—may Allāh have mercy on him—says, "What seems to me closer [to truth] is that analogical inference is invalid as it is based not on the rationale of the law (*'illat al-ḥukm,* legal reason or *ratio legis*) according to Allāh the Almighty; nor is there any proof for it, and so legal ruling cannot depend on it".

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As for deductive inference (*istidlāl*), it is also classified—just like inductive inference (*qiyās*)—into several kinds. One of these is deductive inference based on a clear reason; and this is of two types: [i] the first one is to make plain the rationale of the law in the 'root' [i.e. precedent case] and then explain the fact that the 'branch' [i.e. the new case] is similar to it in having the common legal reason, such as saying that the *legal reason* for the cutting of the hands [in the case of theft] is repelling and discouraging [the people] from illegally taking each other's properties, and since this meaning is found in the stealing of winding sheets (*kafan*), it must follow that cutting off the hand is mandatory [if one is guilty of stealing winding sheets off of corpses]. [ii] The second type is to make plain the rationale of the law in the 'root' [i.e. precedent case] and then explain the fact that the 'branch' [i.e. the new case] is similar to it in having the common legal reason and more, for example, one says: that expiation *(kaffārah)* for murder is mandatory because of unlawful killing, which is a mistake, a notion found in intentional homicide, which is further aggravated by it being sinful; therefore, expiation in this case is even more mandatory. This kind of ruling clearly belongs to the inductive inference in all its rulings. However, the Ḥanafite scholars differentiate *qiyās* from *istidlāl*. They say that expiation cannot be established through *qiyās,*[152] though it may be established by means of *istidlāl.*[153] They cite the mandatory expiation due to eating [while fasting] that the expiation is obligatory because of committing a sin, and the sin of eating [while fasting] is equal to the sin of committing

[152] But rather it can only be established through explicit statement in the sacred text.

[153] According to Shaykh Muḥammad Yāsīn al-Fādānī, by *qiyās* and *istidlāl*, the Ḥanafites mean deriving some ruling from the sacred text (*dalālat al-naṣṣ*), which the Shāfi'ite scholars call *mafhūm al-muwāfaqah* (reasoning by congruent implication or *argumentum ab implicatione*) and *fahwā al-khiṭāb* (reasoning by wider, broader, higher implication or *argumentum a fortiori*) respectively. See his *Bughyat al-Mushtāq fi sharh Luma' Abi Ishāq*, p. 309.

sexual intercourse [while fasting]—if not greater, according to them, so that *a fortiori* the expiation becomes even more mandatory. But this is ignoring the meaning of *qiyās*, as they actually equated eating [while fasting] with sexual intercourse [while fasting] for having a common *legal reason* that necessitates expiation; and this is essentially *qiyās*.

Another kind [of deductive inference] is argument by division (*al-istidlāl bil-taqsīm*), which is of two types: The first one consists of enumerating all the constituents of a ruling and proceeds by eliminating them all in order to negate the ruling altogether, e.g. our saying about the oath [not to approach one's wife] (*īlā'*)[154] that it does not necessarily entail divorce once the waiting period is over, because divorce is pronounced either explicitly or figuratively, and since the oath is neither explicit nor figurative, it cannot result in divorce. The second [type argument by division] consists of eliminating all aspects except one in order to establish it as the only correct one, to state an example, let's say: to accuse [someone of committing illicit sexual intercourse] entails repudiation of one's testimony because one is penalized for such acts, one's reliability in bearing legal testimonies is hense removed. Here, the disallowance for such a person to bear legal testimonies can be either on account of the fact that he was penalized for a committing false accusation, on account of the accusation itself, or on account of both. Now, since it cannot be due to the penalization, nor can it be due to both, it can only be due to the accusation alone.

Also a kind [of deductive inference] is argument from counter-implication (*al-istidlāl bil-'aks*), e.g. saying that if blood-letting (*damm al-faṣd*) were to nullify the ablution then it must follow that a little amount of it would nullify the ablution, just as what we say about urination, defecation, sleep, and all other nullifiers of ablution.[155] Our scholars, however, disagree on this; some of them say it is invalid because it is arguing about something from its reverse and from the perspective of its opposite, while some others say it is valid, which is the most correct view, since it is an inference, the validity of which is

[154] In Islamic law, the term refers to a way of temporarily putting off the wife as a result of an oath uttered by the husband in Allah's name not to go in to his wife.

[155] But the reverse is true, i.e. blood-letting does not nullify the ablution, whether the blood coming out is little or much. Note that it is unlike urination, defecation, and sleep, all of which nullify the ablution.

shown by the testimony of the foundational sources [*al-Qur'ān*, *al-Sunnah* and *ijmā'*].

[61]

DETAIL CONCERNING THAT WHICH COMPRISES JURISTIC INFERENCE

Generally, juristic inference comprises four elements: the 'root', the 'branch', the *legal reason*, and the 'ruling'.[156] The 'branch' is what is ruled [to be such-and-such] through something else. We have already explained this in the preceding chapter on proving the importance of juristic inference and that which makes it a valid means of legislation. Our present discussion will further clarify the 'root', the legal reason, and the ruling. Each one of these will be dealt with in a special chapter, with elaboration on its divisions and elucidation of its various applications.

[156] In categorical syllogistic terms, the 'root', the 'branch', the legal reason, and the 'ruling' correspond to the major premise, the minor premise, the middle term, and the conclusion.

[62]

THE 'ROOT' (*AL-AṢL*) AND WHAT IT CAN AND CANNOT BE

You should know that the term 'root' as used by the jurists refers to two things: First, it refers to the 'roots' [i.e. sources] of law, namely, the Holy *Qur'ān*, the *Sunnah*, and the Consensus (*ijmā'*). The jurists call these the 'root' [i.e. the foundation of Islamic law], whereas the rest, including juristic inference (*qiyās*), argument of speech (*dalīl al-khiṭāb*) and sense of speech (*faḥwā al-khiṭāb*) are the rational implications of the 'root' (*ma'qūl al-aṣl*), as I have already explained in [my previous book entitled] *al-Mulakhkhaṣ fī al-Jadal* (A Concise Treatise on Disputation). Secondly, they use it [i.e. the term 'root'] to mean something which is the 'reference case', such as the case of wine (*khamr*) being the 'root' for *(nabīdh)*,[157] and the case of wheat being the 'root' for rice. It is defined as something the ruling on which is known either from the word that signifies it or by virtue of itself. Some of our scholars define it as something through which the ruling on something else is known, which is not correct, because [for example] price is the 'root' in usury (*ribā*), and yet, it is not something through which the ruling on other things is known.

Section

You should know that the 'root' [i.e. reference case] may be known through the sacred text (*naṣṣ*) or through consensus (*ijmā'*). Those

[157] Traditionally, *nabīdh* is an energizing drink prepared by soaking raisins, dates or other dried fruits into water to the point of fermentation. Until fermentation starts, it is known as *nabīdh* (being at this point quite close to certain types of beers) and is permissible to drink. The Prophet—may Allāh honour and grant him peace—reportedly consumed *nabīdh*. But once fermentation starts, it will noticeably change its colour, develop a certain smell, taste bitter, and cause intoxication if a good amount is consumed. When these characteristics are noticed, it is forbidden to drink. At this state, if it is heated, then, it can become an intoxicant sooner, turning into *khamr*, which is, of course, prohibited (*ḥarām*). For its varieties, see Nawal Nasrallah, *Annals of the Caliphs' Kitchens: Ibn Sayyār al-Warrāq's Tenth-Century Baghdadi Cookbook* (Leiden: Brill, 2007), p. 554.

which are known through the sacred text are of two kinds: those the meanings of which are knowable, and those the meanings of which are unknowable. Those the meanings of which are unknowable, such as the number of prayers and fasting and the like, cannot be determined by logical inference, because logical inference is not allowed except with a certain notion that necessitates a ruling; but if such notion is unknown, then the inference would be invalid. As for those the meanings of which are knowable, there are also two types: [i] those the meanings of which are found elsewhere, and [ii] those the meanings of which are not found anywhere else. Now, those the meaning of which is not found elsewhere cannot be used as a reference case, while those the meaning of which is found elsewhere may be used as a reference cases, irrespective of whether what is stated in the sacred text is widely accepted or still disputed as far as its expression of the legal reason (*ta'līl*) is concerned, [and irrespective of whether what is stated in the sacred text] differs from or agrees with juristic logical inference from the sources (*qiyās al-uṣūl*). Some scholars, however, maintain that juristic inference is not allowed unless it is based on a 'root' with undisputed expression of legal reason.

Yet, al-Karkhī and other Ḥanafite scholars hold that juristic logical inference is not permitted if it is based on a 'root' that goes against logical inference [of the sources] unless its expression of legal reason is established either by the sacred text or by the consensus or by another source [of law] that agrees with it, which is a type of juristic logical inference known to them as 'preference' (*al-istiḥsān*). The argument for the permissibility of juristic inference based on a 'root' with a disputed expression of legal reason is thus: either the consensus of the whole Muslim community should be considered, which in turn would necessarily invalidate juristic logical inference since the opponents of juristic logical inference are part of the Muslim community and most of them agree that the 'roots' are not subject to logical explanation (*ghayr mu'allalah*), or the consensus of the proponents of juristic inference should be considered rather, which would be meaningless since their consensus is not authoritative separate from the rest, so that the *qiyās* they agree in is no different from the *qiyās* they disagree in. Against al-Karkhī and those who share his view, it can be argued that whatever is stated in the sacred text that runs counter to juristic logical inference is a preceding established root (*aṣl thābit*), just as whatever is stated in the sacred text that concurs with juristic logical inference is an established root too,

and therefore, if juristic logical inference is permitted on the basis of texts which concur with logical inference, it should be also permitted on the basis of those which do not concur.

Section

As for [the 'root' i.e. reference case] that is known through consensus (*ijmā'*), it is treated like that which was established by the sacred text, whereby juristic logical inference may be applied to it, as we have explained in detail earlier when discussing the sacred text. Some of our scholars, however, say it is not permissible to apply juristic logical inference to it as long as the sacred text for which they have agreed remains unknown, which is not a correct opinion, because consensus, like the sacred text, is one of the principles in establishing [Sharī'ah] rulings, and therefore, if juristic logical inference may be applied to what is established by the sacred text, it should be also permissible to apply it to that which was established by consensus.

Section

With regard to that [i.e. reference case] which is established through analogical inference with something else, scholars agree that it is possible to derive from it the meaning through which it is established, as well as to compare other cases with it. But [the question arises] whether one may derive from it a different meaning other than the meaning by which it is compared with something else and by which something else may be compared with it, such as comparing rice with wheat in usury on account of it being food, and putting away rice for its being a kind of plant inseparable from water, and comparing it with water-lily (*nīlūfar*). On this [question], there are two opinions: Some of our scholars say, it is permissible, while others say, it is not allowed, which is the view of Abū al-Ḥasan al-Karkhī. In [my book entitled] *al-Tabṣirah*, I myself defended its permissibility, although the correct view I hold now is that it is not permissible, because it means establishing a ruling for the 'branch' [i.e. a new case] without any reason in the 'root' [i.e. source], for here, the legal reason is being food, and so whenever we compare water-lily to it—as we mentioned above—we would bring the 'branch' back to the 'root' without any reason, and this is not allowed.

Section

As for other 'roots' that are not established through any one of the above-mentioned methods, or those established [through one of them] but have been subsequently abrogated, they cannot be used for juristic inference, because the 'branch' can only be established through an established root. Consequently, if the 'root' is not established, the 'branch' cannot possibly be established through it.

[63]

THE LEGAL REASON AND WHAT IT CAN AND CANNOT BE

You should know that the term *'illah* in [Islamic] law refers to the notion on which a legal ruling is based, whereas the term *al-ma'lūl* (that which is caused) has two explanations: some of our scholars say that it is where the *'illah* is located, such as wine and wheat; yet some others say that it is the legal ruling (*ḥukm*). The *mu'allal* (that which is taken to be the cause) is the 'root', the *mu'allal lahu* (that for which the cause is supposed to be) is the legal ruling, the *mu'allil* is the one who establishes the *'illah*, and the *mu'tall* is the case to which the *'illah* is applied.

Section

You should know that legal reasons (*'ilal*) according to Sharī'ah serves as indicators of and pointers to legal rulings. Some of our scholars, however, maintain that they necessitate the corresponding legal ruling, once they were determined to be *'illal*. Don't you see that their presence make legal rulings necessary? And yet others say they do not necessitate corresponding legal rulings, for if they did, they would not exist sometimes without their corresponding rulings, like logical causes; and we know that these causes (*'ilal*) existed before the Sharī'ah, even though they did not imply any legal ruling, which shows that they are not necessitating.

Section

The legal reason demonstrates only the legal ruling for which it is set forth. Consequently, if it is set forth to affirm [a legal ruling], it cannot imply negation [of the said ruling] and *vice versa*: If it is meant for negation, then it cannot imply affirmation. Yet, if it is meant for both negation and affirmation, which is the legal reason which is stipulated for the legal ruling in general, whereby it implies both negation and affirmation, then a legal ruling will exist whenever it exists, and will disappear with its disappearance. Some scholars,

however, say that every legal reason demonstrates two rulings, i.e. affirmative and negative, and therefore, if it is meant to affirm, the ruling can only be affirmative whenever the legal reason exists, and it can only be negative whenever the legal reason is not there. But this opinion is incorrect, because the legal reason from the Sharī'ah point of view is an argument or indicator (*dalīl*), which is why it is possible that no legal ruling is linked to it. Indeed, the logical argument (*al-dalīl al-'aqlī*) which is self-explanatory may demonstrate some ruling in a place where it is found, but later, it disappears, and yet the ruling may remain [valid] by virtue of another proof; so, an evidence in the divine law (*al-dalīl al-shar'ī*) which became an evidence by the doing of a doer is even more capable of doing so.

Section

It is possible for one legal ruling to be established by two, three, or more legal reasons. For example, a death sentence is necessary due to murder, adultery and apostasy, while prohibition of sexual intercourse takes effect because of menstruation, when in a state of pilgrim sanctity (*iḥrām*) during pilgrimage, when fasting, when committed to stay (*i'tikāf*) in the mosque, and during the waiting period (*'iddah*) after divorce.

Section

Still, it is possible that one legal reason is used for similar rulings. For example, the state of pilgrim sanctity (*iḥrām*) necessarily entails the prohibition of sexual intercourse, using perfume, wearing clothes [designed to surround the body via sewing or felting], etc. Also, it is possible for different [non-similar] rulings to be issued on account of one legal reason. For example, menstruation not only entails the prohibition of sexual intercourse but also entails permission not to perform prayers. Nevertheless, it is not possible that a single legal reason becomes the basis of opposing rulings, such as prohibition and permission of sexual intercourse at the same time, as these are contradictory.

Section

Furthermore, it is possible that a legal reason is used to establish a ruling initially (*fī al-ibtidā'*), such as the [divorced woman's] waiting

period causing the prohibition of marriage. It may also be the case that a legal reason is operative both initially and perpetually, such as fosterage or milk-kinship (*raḍā'*) causing annulment of marriage.

Section

In linking the 'branch' to the 'root' [i.e. the new case to the precedent or principle], it is necessary to have a common *legal reason* that brings them together. According to some Iraqi jurists, in making an inference suffices it to point out some resemblance between the 'branch' and the 'root' on the assumption that the former is similar to the latter. Now, if they mean by this that there is no need for any cause, the validity of which is absolute, that necessarily entails a ruling, such as the logical causes, then, there is no dispute concerning this. However, if they mean by that suffices it to have any kind of resemblance, as espoused by the advocates of analogical inference *(qiyās al-shabah),* then we have already explained it [in the section] on various kinds of juristic inference. And if they mean that there need not be any specific notion that necessitates the linking of the 'branch' with the 'root', then it is wrong, because if it were so, there would be no need to make a judgment using one's own discretion (*ijtihād*), and it would be possible to link the 'branch' to any 'root' without any thinking, which is something nobody would say, and therefore, what they say is absurd.

Section

The legal reason that links the 'branch' and the 'root' is of two types: [i] those which are explicitly stated in the sacred texts (*manṣūṣ 'alayhā*), and [ii] those which are logically extracted (*mustanbaṭah*) [from the sacred texts]. An example of those which are explicitly stated in the sacred text is what is said about wine being prohibited due to its ravishing intensity, which may be used as legal reason, and the sacred text pronouncement [of it being the legal reason for the ruling] renders all search for the proof of its validity superfluous in terms of logical inference and influence. Some scholars claimed that it is the legal reason in the matter expressed in the sacred text, but cannot be the legal reason for other than that, except if due to an additional or separate reason. The proof that it is a legal reason is that if the ravishing intensity [of wine] as the legal reason of its prohibition can be known by logical derivation (*bil-istinbāṭ*) and if

other things can be compared to it, then it can be [known to be so] through the sacred text and other things can be compared to it as well. As for the proof against that it is a legal reason only for the thing in which it is found and not for anything else is that if it were not a legal reason for the thing as well as other things except through the sacred text pronouncement, then reasoning (*naẓar*) and using one's own discretion (*ijtihād*) would have fallen away; for if the sacred text declares it to be legal reason for them, then there would be no need for us to search [for knowledge of rulings] or to make a judgment using one's own discretion.

Section

An example of those which are logically extracted (*al-mustanbaṭah*) [from the sacred text] is the ravishing intensity found in wine, which is known through logical derivation. This can be a legal reason, although some scholars say that it cannot be unless it is stated by the sacred text or by there is consensus concerning it. But, this is a mistaken view, because the Prophet—may Allāh honour him and grant him peace—reportedly said to Mu'ādh—may Allāh have mercy on him—"How will you judge?" Mu'ādh replied, "[I will judge] according to what is in the Book of Allāh." The Prophet asked, "What if you do not find it in the Book of Allāh?" Mu'ādh said, "Then [I will do so] with the Tradition *(Sunnah)* of the Messenger of Allāh." The Prophet said, "What if you do not find it in the Tradition of the Messenger of Allāh?" Mu'ādh answered, "Then, I will use my own discretion (*ajtahidu bi-ra'yī*)".[158] If determining the legal reason were not allowed except through what is established by the sacred text or consensus, there would be nothing left to exercise one's discretion on.

Section

The legal reason may be [i] a notion affecting a judgment or ruling, whereby the ruling would be in place whenever the notion exists and would be gone once the notion disappears, such as the ravishing intensity in relation to the prohibition of wine, entering the state of prayer in relation to the prohibition of talking, but may sometimes also be [ii] an indicator rather than being the legal reason itself, such

[158] This report is found in Abū Dāwūd, *Sunan* (3592), Aḥmad, *Musnad* (5:230, 236, 242), and al-Tirmidhī, *Jāmi'* (1327).

as our view concerning the invalidity of 'suspended' marriages, because a sane mature (*mukallaf*) husband does not have the right to divorce in such a marriage, and concerning the act of *ẓihār* [i.e. telling his wife: "You are to me like the back of my mother"] by a non-Muslim living under Muslim laws and protection in Muslim lands *(dhimmī)* that since his divorce is valid, so is his *ẓihār*, just like that of a Muslim. Yet, whether the legal reason can be the resemblance [between two cases] whereby the ruling will not disappear with its disappearance and which does not prove the ruling either, such as our view about performing ablution in order [*tartīb*, i.e. washing the parts in the prescribed sequence] that since it is a kind of worship which may be annulled by the nullifiers of ablution, therefore, like prayer it is mandatory to maintain the order. We have explained this from two perspectives in [the section on] analogical inference (*qiyās al-shabah*).

Section

The legal reason may be sometimes a notion through which some aspect of the wisdom behind its connection with the ruling is known, such as the intoxicating effect of wine, but sometimes it may be a notion through which no aspect of wisdom behind its connection with the ruling is known, such as the being-foodness of wheat [in it being considered a *ribawī* item].

Section

The legal reason may be featured sometimes [i] as an adjective, such as our saying about wheat that it is edible, [ii] as a noun, such as our saying: dust and water, [iii] as a Sharī'ah ruling, such as our saying that one's ablution is valid, or that one's prayer is valid. Some scholars, however, say that a noun cannot considered a legal reason, which is wrong, because every notion that can be connected to a ruling from the sacred-text-perspective can also be extracted from the source and linked to the ruling, such as adjectives and judgments.

Section

It is possible for the feature [of legal reason] to be either negation or affirmation. An example of affirmation is to say: because he is eligible for inheritance, while an example of negation is to say that he is not

eligible for inheritance, and it is not dust. Some scholars, however, say that a negation cannot be made legal reason, but the argument that supports our view is that everything which can be explained causally through the sacred text can also be explained causally through logical derivation, just like affirmation.

Section

The legal reason can have one feature as well as two features or more, and there is no limited number for it. But, some jurists reportedly say that it should not exceed five features. This is hard to explain because the legal reason are Sharī'ah-sanctioned. So, if a Sharī'ah ruling could be linked to five features, it is possible for it to be linked to more than that.

Section

A legal reason may be non-extendible [to new cases], such as the view of our scholars concerning gold and silver, but also may be extendible (*muta'addiyah*). Some of Ḥanafite scholars, however, maintain that it cannot be non-extendible (*wāqifah*). But, this view is incorrect because, as we have explained, legal reasons are Sharī'ah indicators, and consequently such indicators can be made into notions that are non-extendible, just as they can be made into notions that are extendible.

[64]

EXPLAINING THE LEGAL RULING

You should know that a legal ruling is that which is connected to the legal reason in terms of permission, prohibition, obligation and exemption. It is of two kinds: explicit (*muṣarraḥ bihi*) and implicit (*ghayr muṣarraḥ bihi*). The explicit one is like our saying: it is possible to be obligatory, or it is necessary to be obligatory, and the like. As for the tacit (*al-mubham*), it is of several kinds; for example:

Our saying that this resembles that. Some scholars say that it is not valid because it is unclear, while others say, it is valid, which is the correct opinion, because what is meant is that it resembles it with regard to the ruling in question, which is a ruling known to both the persons, who asked and who answered the question, so, the explanation may be suspended due to the existing convention between the two.

Another [type of obscure ruling] is that equality between two rulings be attached to it, e.g. our saying about the necessity of declaring intention for ablution that it is purification, so that both the non-liquid and the liquid are the same as far as the intention is concerned, like the removal of filth. Some of our scholars however say that it is not valid because what is meant by equation between the non-liquid and the liquid in the "root" is removal of [the necessity of] intention, while in the "branch", there is the obligation of intention. But, these are two contrary rulings, whereas juristic inference is to derive a ruling about something from its like and not from its opposite or from a contradictory ruling. Some scholars say that it is valid, however, which is the correct opinion, because the rule of legal reason is equating the liquid and the non-liquid in relation to the mere unaffected, undetailed intention, and this equating of the liquid and the non-liquid in terms of intention is equally found in both the root and the branch. The difference between the two lies in the detail, which is not a concern of the legal reason.

Also of the implicit-rulings category is when the rule of the legal reason consists of affirming the impact of a notion, e.g. our saying about brushing the teeth by a fasting person that it is a kind of purification [*taṭhīr*] for the mouth not because of filth, and therefore, the fast must have some impact on it (i.e. the ruling of brushing the

teeth while fasting), like rinsing the mouth with water; and this is valid because fasting has some impact on rinsing the mouth with water, namely, the prohibition of using too much water, just as fasting has some impact on brushing the teeth, namely, the prohibition of doing it after the sun reaches its zenith or midway point (*zawāl*), even if their respective impacts are different, and the difference in the quality of their impacts does not prevent the validity of their combination, because the purpose is to establish the impact of fasting on each one of them, and both are equal in terms of impact, so that the difference between them in detail does not count.

[65]

THAT WHICH SHOWS THE VALIDITY OF A LEGAL REASON

In short, the legal reason must be shown to be valid, because it is legalistic (i.e. not rational the way the Mu'tazilite claimed) in the same way legal rulings are [legitimate] by way of law. So, in the same way, the ruling must be proven to be valid, the validity of *ratio legis* too must be proven.

Section

A valid rationale for the law may be indicated by two things: the sources of law and [logical] 'extraction' (*istinbāṭ* by jurists). The source is the word of Allāh the Almighty and the sayings and deeds of the Prophet—may Allāh honour him and grant him peace—as well as the consensus [of the Muslim community]. The word of Allāh the Almighty and the sayings and deeds of the Prophet—may Allāh honour him and grant him peace—may indicate [a valid legal reason] by two means: [i] by pronouncement (*min jihat al-nuṭq*), as well as [ii] by implication (*min jihat al-faḥwā wal-mafhūm*). As far as pronouncement is concerned, the clarity may vary from one to another. The clearest are those stated with words denoting rationale [for a ruling], e.g. the Qur'ānic verse, *"For that reason We decreed for the Children of Israel..."* (*al-Mā'idah*, 5:32), and the Prophet's saying, *"I formerly forbad you [to save the meat] for the sake of the migrants"*, and his saying, *"Asking permission [to enter a private house or a room] is made [mandatory] because of the gaze"*, as well as his saying, *"Does the fresh date (ruṭab) shrink when it dries? When somebody replied, "Yes", the Prophet said, "Then, no!"*,[159] namely, for that reason. All these are clear statements of legal reason [or rationale for the law].

[159] The complete *ḥadīth* is narrated by Mālik in his *al-Muwaṭṭa'* thus: 'Abdullāh ibn Yazīd the *mawlā* of al-Aswad ibn Sufyān informed us that Zayd Abū 'Ayyāsh the *mawlā* of Banī Zuhrah informed him that he asked Sa'd ibn Abī Waqqāṣ about someone who bought ordinary barley with another variety of barley, so Sa'd asked him, 'Which of the two are better?' He answered, 'The ordinary barley.' He [i.e. Zayd] said, "He forbade me to do that and he said,

Next, in terms of clarity and plainness is by mentioning an adjective denoting nothing else but rationale of the law, e.g. the Qur'ānic verse concerning wine, *"Satan seeks only to cast among you enmity and hatred by means of wine ..."* (*al-Mā'idah*, 5:91), and the Prophet's saying about the blood of *istiḥāḍah* [i.e. bleeding outside the time of monthly period] that is a natural blood (*damm 'irq*),[160] and his saying about cats that *"They are of those who move around among you"*, and his saying about a cat in the house of so-and-so that *"cats are carnivores"*, and that *"cats are not filthy"*. All these descriptions, though not explicitly stating a rationale of the law, do contain explanation of the legal reason, as they mean nothing else but justification of the ruling.

Thereafter comes in descending order of clarity the linking of a ruling to something with a certain characteristic. This characteristic is most likely a legal reason. It may come up in a conditional sentence, such as in the *Qur'ān*, *"But if they are pregnant, then spend for them..."* (*al-Ṭalāq*, 65:6), and the Prophet's saying, *"If somebody sells fertilized date palms, the fruits will be for the seller unless the buyer stipulated otherwise"*.[161] It is clear [from these pronouncements] that pregnancy is the legal reason for the obligation of providing maintenance [food etc. to the divorced wife], and the fertilized work is the legal reason for the fruits being given to the seller. And it may also come not in a conditional sentence, such as the Qur'ānic verse, *"And the thief, both male and female, cut off their hands ..."* (*al-Mā'idah*, 5:38), and the Prophet's saying, *"Do not trade food for food except like for like or equal for equal"*. These statements make clear that theft is the legal reason for mandatory amputation, and being-foodstuff is the rationale for the prohibition of [making profit from] excess in the exchange of two counter-values.[162]

'I heard the Messenger of Allāh—may Allāh grant him honor and peace—when asked about someone who bought dried dates with fresh dates, inquired, "Does the fresh date shrink when it dries?" On hearing the answer, "Yes", he forbade it".

160 As narrated by al-Bukhārī in his *Ṣaḥīḥ* (306 and 320), "Kitāb al-Ḥayḍ, Bāb al-Istiḥāḍah and Bāb iqbāl al-Ḥayḍ wa-Idbārihi.

161 As narrated by al-Bukhārī in his *Ṣaḥīḥ* (2204, 2206, 2379 and 2716), "Kitāb al-Buyū'", "Kitāb al-Musāqāh" and "Kitāb al-Shurūṭ".

162 This unlawful practice, known as *ribā al-faḍl*, refers to any commodity-for-commodity exchange transaction (i.e. selling and buying, barter or trade) in which the exchanged commodities are of the same type but of unequal measure, or the delivery of one commodity is postponed.

As for the role of both [the *Qur'ān* and the *Sunnah*] in pointing out the rationale of Sharī'ah by implication (*min jihat al-faḥwā wal-mafhūm*), the texts vary from one to another in terms of clarity. The clearest among them is indicated by admonition, such as the Qur'ānic verse, *"Do not say 'uff' to them [your parents]"* (*al-Isrā'*, 17:23), and the Prophet's prohibition of sacrificing an animal that has lost one of its eyes (*al-'awrā*). On hearing this, one understands by implication that hitting one's parent is even more prohibited, and that offering a blind animal for sacrifice is much more prohibited.

The second one in terms of clarity [under this category] is when a characteristic is mentioned that is understood as conveying a notion implied by the adjective, without admonition. Take, for example, the Prophet's saying, *"A judge should not make a decision when he is angry"*, and his saying about a rat that has fallen into butter-fat [and died], *"If it is solid, throw away the rat and the portion of butter-fat around it [and eat the rest] and if it is liquid, then throw away the melting butter"*. From these statements, one can conclude through a bit of thinking that anger precludes [sound] judgment as he is emotionally charged, and that a person who is hungry and thirsty is like that, and that the Prophet—may Allāh honour him and grant him peace—ordered the throwing away of the portion of butter-fat around the rat that fell if it is solid and letting it go if it is liquid because of its being solid and liquid respectively, and that the case of sesame oil and olive oil is no different.

Section

The deeds of the Prophet—may Allāh honour him and grant him peace—may also indicate the rationale of the law, that is, if he did something when an occurance comprising of a legal notion occurred, whether in relation to him or to other than him, so that we know that he did not do it except because of the notion that was appearant to him, which in turn becames the legal reason for that particular action. For example, it is reported that the Prophet—may Allāh honour him and grant him peace—had once forgotten something [during his prayer] and so he prostrated. From this, we know that forgetting something was the reason for doing the prostration. In another report, a certain Bedouin had sexual intercourse [while fasting] in Ramaḍān and the Prophet—may Allāh honour him and grant him peace—obligated him to free a slave. From this, we also

know that sexual intercourse [while fasting] was the reason for the obligation of expiation.

Section

As for the consensus (*ijmā'*), it may indicate the rationale of the law when the Muslim community agree on establishing it as the legal reason [for a particular ruling]. For example, it is reported that 'Umar—may Allāh be pleased with him—said [following a demand by some Companions] for dividing the conquered lands [of Iraq], "If I divide it among you, it will circulate around the rich among you", [a decision] which they did not oppose.[163] Another example is what 'Alī—may Allāh honour his face—said about the wine drinker that "If he drinks, he will become intoxicated; and if he becomes intoxicated, he will lose his mind; and if he loses his mind, he will slander. Therefore, I suggest that he be punished for being slanderer".[164] This suggestion was not opposed by anyone as far as the legal reasoning is concerned.

Section

The second type of proof for the validity of a legal reason is logical extraction (*al-istinbāṭ*). This [may be looked at] from two aspects: [i] with regard to effectiveness (*ta'thīr*), and [ii] with regard to testimony of the sources (*shahādat al-uṣūl*). The former aspect is when a ruling exists by virtue of a certain notion such that it is reasonable to say that the ruling is established due to that reason, which known either [i] by negation and affirmation, i.e. the ruling would stand as long as the legal reason exists, and it would be void once the legal reason disappears, such as the ruling about wine that it is a drink with ravishing intensity, since it was initially permissible prior to the occurrence of intensity (i.e. while it was still juice) and it becomes forbidden afterwards (i.e. when became wine), and then it becomes permissible again when the intensity is gone (i.e. when it becomes vinegar); from which we know that it [i.e. intoxicating power] was the legal reason [of its prohibition]; or [ii] by [the logical method of] division [and elimination], i.e. by negating all notions couched in the

[163] For a full account, see Abd Al-Aziz Duri, *Early Islamic Institutions: Administration and Taxation from the Caliphate to the Umayyads and the Abbasids* (London: I.B. Tauris and Centre for Arab Unity Studies, 2011), 89-90 .

[164] As narrated by Mālik in *al-Muwaṭṭa'* (2:842) and al-Shāfi'ī in *al-Umm* (6:180).

'root' except for one notion only, from which we know that it is the legal reason, like what we say about bread that since it is prohibited for *ribā*, its prohibition must be due to its volume, it being food, or its weight, and then the two alternatives are negated; therefore we know that it is only for the fact that it is food.

As regards testimony of the sources (*shahādat al-uṣūl*), it relates specifically to the indexical inference *(qiyās dalālah)*, i.e. when the validity of the legal reason is pointed out by the testimony of the sources. For example, we say concerning guffaw that what does not remove ritual purity outside prayer will not do so during prayer, just like talking. In support of this, it is said that the sources attest to the equal treatment of the two situations, inside and outside the prayer. Don't you see that what nullifies ablution inside the prayer also nullifies it outside prayer, such as all causes of impurity (*al-aḥdāth*), and likewise what does not nullify it outside the prayer, does not nullify it inside the prayer either. Therefore, it must follow that laughter is like that too.

Section

All remaining methods other than these [mentioned] cannot show the validity of a legal reason. Some jurists however say that [for any other method] as long as there is nothing which contradicts and invalidate it, it can show the validity of a legal reason. According to Abū Bakr al-Ṣayrafī, its consistency proves its validity. But, against those who take the absence of anything which invalidates them as proof of their validity, we argue that if this could be taken as a proof, then any report of unknown validity that is neither opposed nor contradicted by anything must be regarded as valid. Yet, this is something nobody would say. Now, against al-Ṣayrafī it can be argued that the consistency of the legal reason (*ṭard*) is the action of someone who makes logical inference, which in itself is not an authoritative argument in religious matters. Moreover, his saying that it is consistent simply means that there is nothing contradictory which could invalidate it; but as we already explained, the absence of anything which invalidates it, is not a proof of its validity.

[66]

THAT WHICH INVALIDATES LEGAL REASONS

The unique, prominent Shaykh—may Allāh have mercy on him and be pleased with him—says: In [my book entitled] *al-Mulakhkhaṣ fī al-Jadal,* I have enumerated the 15 types of things that can render the rationale of the law invalid. Here, I shall mention what is relevant to [the purpose of] this book—*inshā Allāh*—and say: Ten things can make legal reason invalid.

First, when there is no proof for its validity; this shows its flaw [i.e. the legal reason is therefore invalid]. For, as I already explained in the previous chapter, the legal reason is legalistic,[165] and so if there is no support for its validity from the Sharī'ah point of view, it cannot be a legal reason and should therefore be regarded as invalid.

Second, when a legal reason is suggested for something that cannot be established by logical inference, e.g. the minimum and maximum duration of monthly period, the coining of names [words or terms] and the invention of language—according to those who deny their establishment through reasoning—and all other matters that are not subject to logical operation as explained earlier. This also shows the legal reason to be invalid.

Third, when the legal reason is deduced from a 'root' from which it cannot be extracted, e.g. when an inference is based on an unsettled principle, such as something abrogated (*mansūkh*), or something on which there is no established ruling. This is because the 'branch' cannot stand firmly except with the 'root' so that if the latter is not established, then it would not be possible to establish the 'branch' with respect to it. Likewise, if the Sharī'ah has specified the 'root' and has prohibited its use for logical inference, such as was done by the companions of Abū Ḥanīfah—may Allāh have mercy on him—who inferred the permissibility of contracting marriage [with a woman who gives herself] through verbal offer (*bi-lafẓ al-hibah*) to men other than the Prophet—may Allāh honour him and grant him peace—on the basis of the Prophet's deed, even though the Sharī'ah clearly states that such provision is meant only for the Prophet—may

[165] Meaning, it is legalistically determined, not rational.

Allāh honour him and grant him peace,[166] and therefore, one is not allowed to derive a ruling based on this, because juristic inference is only permitted with regard to matters that are not precluded by the divine law. Yet, if the Divine Law has expressed its prohibition, then it is not allowed, which is why juristic inference is not permitted if the sacred text or consensus preclude it.

Fourth, when the characteristic (*al-waṣf*) that is turned into a rationale of the law is in fact not qualified for it, e.g. [a] if an eponym (*ism laqab*) or negative attribute (*nafy ṣifah*) is used as the rationale of the law—according to those who do not allow this; or [b] if some sort of resemblance (*shabah*) [is used as the rationale of the law]—according to those who prohibit analogical inference; or [c] if some attribute [is used as the rationale of the law]—according to those who deny its existence in both the 'root' and the 'branch'. In such cases, the legal reason becomes invalid, because every legal ruling depends on legal reason, and if the legal reason neither yields nor establishes any ruling, then legal judgment cannot be established through it.

[v] Fifth, when the legal reason is not the effective cause of the ruling (*la takūn mu'aththirah lil-ḥukm*). This shows that the legal reason is invalid. Some of our scholars however say that this does not necessarily make it invalid, which is the view of those who maintain that its consistency (*ṭard*) indicates its validity. But I have already shown its invalidity. Some other scholars [from our school] say that its pushing away contradiction (*naqḍ*)[167] is to really have effect (*ta'thīr*), which is wrong, because the one with effect (*al-mu'aththir*) is that on which a legal ruling hangs from Sharī'ah point of view, whereas pushing away contradiction from the view of the one who put forth the legal reason is not itself an argument for dependence of legal ruling on it from the Sharī'ah point of view, as it is merely so according to him. Yet, the goal is not to find his rationale, but rather the rationale of the Divine Law, which is why this opinion falls away. In any case, the place of effect of legal reason has two positions among our scholars. Some of our scholars say the effectiveness should be found in the 'root', because legal reason initially sprang from the 'root' before the 'branch' is compared to it. So, without effectiveness

[166] The precedent is mentioned in the Holy *Qur'ān*: *"And a believing woman if she gave herself to the Prophet (in wahabat nafsahā li al-nabiyyi), if the Prophet desired to marry her –a privilege for you only, not for the [rest of] believers ..."* (*al-Aḥzāb*, 33:50).

[167] This term refers to the ruling not following the rationale (*takhalluf al-ḥukm 'an al-'illah*).

in the 'root', the legal reason cannot be established in the branch. So, it will be like linking a 'branch' to a 'root' without any reason. Still, some others maintain that suffice it for the effectiveness to be found anywhere in the sources. This is the view held by our Shaykh al-Qāḍī Abī al-Ṭayyib al-Ṭabarī—may Allāh have mercy on him—which is correct for me, because if it is found anywhere in the sources, then the legal reason is valid, and if the legal reason is valid somewhere, then legal ruling must stick to it wherever it is.

Sixth, when the legal reason is negated, that is, when it exists without being followed by any ruling. According to the Ḥanafite scholars, however, the existence of a legal reason without any ruling is not a negation of it, but rather is a kind of specification (*takhṣīṣ*) for it, and not a negation. This is a mistaken view because legal reason are deduced, so if one exists without a legal ruling, it must be invalid. The proof [of this is] logical reasons (*al-'ilal al-'aqliyyah*)—[i.e. if we have a logical cause that is detached from a logical effect, the logical cause must be valid].

But if a certain concept representing a legal reason (*ma'nā al-'illah*) exists, while no ruling exists—a situation which pseudo-jurists call 'breach' (*kasr*) and 'violation' (*naqḍ*) through a concept, i.e. when a legal reason or some of its features are replaced by something similar (*fī ma'nāhu*) which exists without any ruling, it needs to be investigated; if the replacing concept does not affect the ruling (*ghayr mu'aththir lil-ḥukm*), the legal reason is considered invalid, because it must be dropped if it has no effect, and once it falls away, nothing would remain. Of course, whether nothing would remain so that the argument crumbles, or something would still remain but then it breaks down, the invalidity [of the legal reason under consideration] is ultimately due either to ineffectiveness (*'adam al-ta'thīr*) or to the said breakdown, as we have already explained. Yet if the replacing concept does affect the ruling, then the legal reason is not considered invalid, because something effectual on a legal ruling must not be dropped, and so invalidity is not directed against the legal reason through it.

Now, in case a legal ruling exists without any legal reason,[168] we have to look into the matter as follows. If the legal reason is meant for a general legal ruling, then it is a 'void' (*naqḍ*, i.e. a legal ruling

[168] This situation is known as the lagging of legal reason behind a legal ruling (*takhalluf al-'illah 'an al-ḥukm*) as opposed to the lagging of a legal ruling behind its legal reason (*takhalluf al-ḥukm 'an al-'illah*). See al-Fādānī, *Bughyat al-Mushtāq*, 337.

existing without any legal reason), as when we say that the legal reason for obligating maintenance [of a woman] is to enable or authorize [the husband] to have pleasure [with her], so that wherever maintenance is obligated while authorization [to have pleasure] is denied, it is a 'void' (*naqḍ*), and likewise wherever the authorization is granted without obligation of maintenance, it is a violation too. This is so because it is assumed that the authorization is the only legal reason for this ruling, and there is no other reason for it, thereby, implying that if wherever it is there, the other must follow, and wherever it is missing, the other must be dropped, so that if it is there while the other is not obligated, or wherever it is missing while the other is not dropped, the reasoning would crumble.

However, if the legal reason is meant for an individual ruling, and not for the class-ruling (*jins*), it is not a violation. For it is possible that in one case where a legal reason exists, a legal ruling is made due to this legal reason, and in another case where the legal reason is not found, a legal ruling is made based on another legal reason, e.g. when we say about a woman having her monthly period that sexual intercourse with her is forbidden because of menstruation, and when there is no menstruation but the woman is in the state of ritual purity during pilgrimage (*muḥrimah*) or in her waiting period after divorce (*mu'taddah*), the prohibition [of sexual intercourse] remains because a different reason.

Seventh, when it is possible for a legal reason to be flipped around [so that it results in the opposite conclusion], that is to say, when it is linked to a contradictory ruling, while inference is being made to the same root. This may be done through an explicit legal ruling or an implicit one. The explicit one is when we [the Shāfi'ites] say: [the head] is an organ of the ablution, and therefore, a quarter cannot be the determined portion [for the fulfillment of the obligation of wiping], in the same way that cannot be said concerning [the wasing of the] face; to which a [Ḥanafite] opposer might say: [the head] is an organ of the ablution, and therefore, it is not enough [for the fulfillment of the obligation] only the minimum of what the word [wiping] can be applied to, just as that is not enough for [fulfilling the obligation of] washing the face. Some of our scholars, however, say that this does not make the legal reason invalid, nor does it undermine the legal reason, because it is estimating the legal mater based on a 'root' matter that is founded on a legal reason. Yet according to some of them, it is like being in opposition to another legal reason, so that in both cases preponderating the evidences

(*tarjīḥ*) is necessary. The correct view is that the possibility of being flipped around necessitates the invalidity of the legal reason. It undermines [the legal reason] because it is opposed by something that cannot be reconciled with its legal reason, so that it is like being opposed by an initial legal reason. And it necessarily invalid because it can be linked to two contradictory legal rulings, therefore its invalidity must be asserted.

As for the flipping around [of a legal reason] through an obscure ruling (*ḥukm mubham*), it is to flip the legal reason around in such a way that it equally justifies two different conclusions (*qalb al-taswiyah*). For example, a Ḥanafite says that [the Ablution] is purification using a liquid, and therefore does not require intention, just like the removal of filth (*najāsah*) with liquid, to which al-Shāfi'ī says: then, just like removal of filth, there should be no distinction between removal with liquids and removal with solids in relation to the necessity of intention or not, for, it is simply purification with liquid.[169] Some of our scholars say that it is not correct, because what is meant is equating the liquid with the solid in the 'root' by dropping the need for declaring intention, and in the 'branch' by requiring declaration of intention. Yet, some others say it is correct, which right, because equating the liquid with the solid will contradict the legal reason used by the one who argues for dropping the need to declare intention, so that the ruling will be one that is explicit.

Eighth, when a legal reason does not necessarily entail its ruling in the 'root' [i.e. precedent]. This is of two types. First, when it implies a ruling in the 'branch' [i.e. a new case] with something additional or less than what it does in the 'root', which shows that it [i.e. the legal reason] is invalid. For example, a Ḥanafite says there is no need to specify intention for fasting in Ramaḍān because it is something that deserves [the intention in this regard], so that it does not need specific declaration like giving back a deposit. This is not correct because it produces a ruling on the 'branch' that is different

[169] According to the Ḥanafite school, intention is not necessary in ablution (*al-wuḍū'*), but it is in dry ablution (*al-Tayammum*). For the non-necessity of intention in ablution, they make inference to the removal of filth, arguing that since the removal of filth with liquid does not require intention, then, the ablution, which is purification with liquid, must likewise not necessitate intention. The Shafi'ites counter argue, saying that in the removal of filth does not necessitate intention, whether with liquids of solids, so, if you make inference on that, then *tayammum* must likewise not necessitate intention, for, in the root issue (the removal of filth) no distinction is made.

from the one on the 'root'; it drops with regard to the 'root' the need for specifying the intention along with declaring it, while suggesting to drop specifying the intention with regard to the 'branch'. And among the tasks of the legal reason is to establish a legal ruling on the 'root', which is then extended to the 'branch', whereby what applies to the 'root' is transferred to the latter. Thus, if the ruling [applied to the 'root'] is not transferred to the latter, then this shows the invalidity [of the suggested legal reason].

Second, when the legal reason does not imply a ruling on its parallels (*naẓā'ir*) as it does on the 'root', e,g. a Ḥanafite saying there is no *zakāt* on the property of an underage child because he has not yet committed *īmān*, and so there is no obligation of *zakāt* on his property just like the infidel [who is exempted from paying *zakāt*]. But, this is invalid, because it [i.e. having not yet committed to *īmān*] does not necessarily entail the same ruling in parallel cases as it does with regard to the 'root'. Don't you see that it does not necessarily entail exemption of one tenth [amount of *zakāt* imposed] on his crops, nor [does it exempt the child] from *zakāt al-fiṭr* on his property, just as it does with regard to 'root'. This shows invalidity [of the lagal reason in question]. For, if it did necessarily entail such ruling on the 'branch', it would have necessarily entailed the same ruling on its parallel cases, just as it did on the 'root'.

Ninth, when a ruling is upheld along with another ruling in place despite their difference. This is what qualifying jurists call 'mistaken consideration' (*fasād al-i'tibār*), which can be recognized by two means: [i] verbally, whereby the Sharī'ah expressly makes a distinction between the two cases, thereby showing [the above-mentioned procedure to be] an improper conflation of them. For example, when [the number of] divorce [allowed] is held in legal commonality with the [length of the] waiting period (*'iddah*), the consideration being in this case whether the woman is a slave or a free person,[170] which is incorrect, because the Prophet—may Allāh honour him and grant him peace—distinguished them on this issue, saying that: divorce to men, while the waiting period is to women (*al-ṭalāq bil-rijāl wal-'iddah*

[170] Meaning, the amount of divorces a man is allowed is not affected by the freedom or bonage of his wife. But the length of the waiting period of the divorced woman is affected by whether she is a free woman or a slave. Thus, to connect the two with a single legal basis, whereby her status as a free woman or a slave cannot affect the amount of divorces to which the husband is entitled.

bil-nisā').[171] Therefore, it is wrong to put them under one consideration.

Otherwise, [ii] it can be known from the sources, i.e. [a] when that which is based on generous concession (*takhfīf*) so as to necessitate convenience is put under consideration alongside that which is based on tight restriction (*tashdīd*) so as to necessitate strictness generous concession (*takhfīf*), e.g. conflating mistakes with deliberation, and paying damage-costs with exacting punishments, or vice versa; or [b] when that which is based on stringent regulation (*takhfīf*) is put under consideration with that which is based on generous concession (*takhfīf*) so as to necessitate convenience, like considering deliberation the same as mistake, or [c] when that which is based on strong emphasis (*ta'kīd*) on exemption is put under consideration alongside that which is based on weak emphasis (*taḍ'īf*), e.g. conflating freedom with bondage, and paying damage-costs with exacting punishment; [d] when that which is based on weak emphasis (*taḍ'īf*) is put under consideration alongside that which is based on strong emphasis (*ta'kīd*), so as to necessitate ease, like considering bondage like freedom, and exacting punishment like paying damage-costs. All of these show invalidity [of the legal reason] because the difference between each case in terms of their positions indicates the difference in the legal reason of each from that of the other, even though some scholars say it does not show invalidity if the validity can be proven by some separate evidence.

Tenth, when a legal reason is opposed by any explicit statement of the Holy *Qur'ān*, the *Sunnah*, or consensus (*ijmā'*) that is more cogent. This shows it to be invalid, because all these other proofs are definitely correct, so that there can be no logical inference in contradiction to them.

[171] A *ḥadīth* from Ibn 'Abbās that is narrated by Ibn Abī Shaybah in his *al-Muṣannaf* (4:101) and 'Abd al-Razzāq in his *al-Muṣannaf* (12950).

[67]

CONFLICTING LEGAL REASONS

When two legal reasons are conflicting, they must be either derived from a single 'root' or source, or from two 'roots' or sources. If derived from two sources—such as our rationale for obligating declaration of intention and comparison with dry ablution (*tayammum*), and such as their (i.e. the Ḥanafites) rationale for discarding declaration of intention and comparison with removal of filth, then it is necessary either [i] to drop one of them, based on the invalidity criteria that we already explained, or [ii] to pick one and discard the other, as we shall explain shortly—*inshā' Allāh*. If, on the other hand, they are derived from one source, either one of them is subsumed under the other, or one of them is extendible to what the other is not. If one of them is subsumed under the other, then we must see: if scholars agree that it has only one legal reason—such as the Shāfi'ites suggesting that the *'illah* for wheat being a *ribawī* item is the fact that it is food, whereas the Mālikites suggest that it because it is a storable staple, then it is not allowed to accept both of them, but rather [we must] either eliminate or pick one of them. Alternatively, if scholars do not agree that it has only one legal reason—such as a Shāfi'ite arguing about the *ẓihār* of a non-Muslim citizen (*al-dhimmī*) that since his divorce is valid, his *ẓihār* too is valid, just like that of a Muslim, [a view which some scholars do not share], and a Ḥanafite arguing that the Muslim [in this issue] is different from the *dhimmi* in that the Muslim's performance of the expiation (*takfīr*) [for *ẓihār*] is valid, as opposed the the *dhimmī's*]. Our [Shāfi'ite] scholars disagree, having two positions: Some of them say that they accept both legal reasons since the two are not contradictory, but rather they both agree on establishing one [and the same] legal ruling. Yet, some others say that they do not take both [legal reasons], but rather take recourse to *tarjīḥ* (i.e. evaluating both alternatives and picking one of them). But, the first procedure is more correct, because a legal ruling may indeed have two or three rationales, or even more, some of which are extendible, while some are not, and some of which are extendible to new cases [*lit.* 'branches'] that some others are not. For example, a Shāfi'ite arguing that wheat is a *ribawi* item on account of it being food and a Ḥanafite arguing that it is such on account of it

being of the type of thing that is measured by units. Since these two are different with regard to their respective 'branches', it is impossible to embrace both of them. Therefore, the ruling on them is like the ruling of two legal reasons derived from two sources, in which case either one of them should be considered invalid, or one of them is given preference over the other.

[68]

FAVOURING ONE OF TWO LEGAL REASONS

You should know that 'favouring' (*tarjīḥ*, which literally means 'tipping the balance' in favour of one position against the other) does not take place between two proofs or arguments which necessitate knowledge, nor between two legal reasons which necessitate knowledge, because knowledge will not increase even if one of them is more cogent than the other. In the same way, *tarjīḥ* does not take place between a proof (*dalīl*) or legal reason (*'illah*) that yield sure knowledge (*mūjib/mūjibah lil-'ilm*) and a proof or legal reason that gives only probable knowledge (*mūjib/mūjibah lil-ẓann*), because of what we already explained and because that which necssitates probability does not meet the requirement of that which necessitates certainty, so that if it were favoured as it is, that which yields sure knowledge would override it, thereby rendering the *tarjīḥ* meaningless.

When two legal reasons are conflicting and there is need to 'tip the balance' in favour of one over the other in one way or another, it may be as follows.

First, when one of them is derived from a definitely true source, while the other is not, then the one derived from a definitely true source should take precedence, because its source is more solid.

Second, one of them may have a widely accepted source and its proof is known in detail so that it becomes more cogent than what is widely accepted but whose proof is unknown in detail, because something with a known proof can be examined in terms of its significance and can be favoured over the other.

Third, when one of them is rooted in something known through explicit pronouncement of the source, whereas the other is rooted in [something known through] implication or logical deduction, then the one known through explicit pronouncement is stronger and its corollary more convincing.

Fourth, when one of them is based on something general (*'umūman*) and left unspecified, while the other on something general but specified (*dakhalahu al-takhṣīṣ*), then, the one left unspecified

should be given preference, because the one specified is of weaker import, for according to some scholars, it becomes metaphorical once it is specified.

Fifth, when one of them is based on a root which the sacred text clearly determined as a basis of inference (*qad nuṣṣa 'alā al-qiyās 'alayh*), while the other is not, then the one that has been determined as a basis of inference should be favoured.

Sixth, when one of them is based on something subsumed under the genus of the 'branch' (*min jins al-far'*), so that comparing the former with the latter is preferable [to comparing it] with those which do not belong to its genus.

Seventh, when one of them is traceable to one source, while the other [is traceable] to several sources, then the one traceable to several sources (*mā ruddat ilā uṣūl*) should be preferred. Although some of our scholars hold that they are of equal worth, the first [alternative] view is more obvious, because everything with more roots must be stronger.

Eighth, when one of the legal reasons is an essential characteristic (*ṣifah dhātiyyah*), while the other is a 'judgmental' characteristics (*ṣifah ḥukmiyyah*), the latter should take precedence. Although some of our scholars insist that the former should be preferred, arguing that it is stronger, [we hold that] the first opinion is more correct, because a judgment resembles a judgment more closely [than anything else], so that it is more appropriate to become a proof [than something else].

Ninth, when one of them is explicitly stated in the sacred text (*manṣūṣ 'alayhā*), while the other is not, then the one declared in the sacred text should be favoured, because an explicit statement (*naṣṣ*) is worthier than a logical extraction (*istinbāṭ*).

Tenth, when one of them is negative, while the other is affirmative, then the one carrying affirmation (*ithbāt*) should be preferred, because a negation is still debated whether or not it can be a legal reason; alternatively, when one of them is an adjective (*ṣifah*), while the other a noun (*ism*), then the adjective should take precedence, because according to some scholars, a noun cannot be a legal reason.

Eleventh, when one of them has only few features, while the other has numerous features, then according to some of our scholars the one with less features (*al-qalīlat al-awṣāf*) should be favoured, because it is safer, whereas some others say that the one with more features deserves [to be the legal reason], because it bears closer resemblance to the 'root'.

Twelfth, when one of them has more 'branches' than the other, then according to some of our scholars, the one with more 'branches' should be preferred, because it has more benefits, although some others say that they are of equal value.

Thirteenth, when one of them is extendible (*muta'addiyah*), while the other is non-extendible (*wāqifah*), then the extendible one should take precedence, because its validity is widely accepted, whereas the validity of the non-extendible is still disputed.

Fourteenth, when one of them holds true mutually (*taṭṭarid wa-tan'akis*), while the other holds true unilaterally (*taṭṭarid wa-lā tan'akis*), then the one with reciprocal implication should be favoured, because inversion (*'aks*) is widely accepted as a sign of validity, unlike co-extensiveness (*ṭard*), which is not a proof [of validity], according to the majority.

Fifteenth, when one of them implies caution (*taqtaḍī iḥtiyāṭan*) pertaining to obligation, while the other does not, then the former should be preferred, since it is safer with regard to the obligatory.

Sixteenth, when one of them implies prohibition (*taqtaḍī al-ḥaẓar*), while the other implies permission (*taqtaḍī al-ibāḥah*), then according to some scholars of our School, both are of equal worth, whereas some others say the one implying prohibition should take precedence, since it is less risky (*aḥwaṭ*).

Seventeenth, when one of them implies semantic shift from the original [meaning] to the religious [meaning] (*taqtaḍī al-naql min al-aṣl ilā al-shar'*), while the other implies no semantic shift, then the one implying change of meaning, should be given preference, although some of our scholars say the one implying no semantic shift should be preferred. However, the first view is more correct, because the one implying semantic shift carries a religious judgment (*tufīd ḥukman shar'iyyan*).

Eighteenth, when one of them entails religious punishment (*tūjib ḥaddan*), while the other drops it, or when one of them entails manumission, while the other drops it, then according to some scholars it should take precedence because religious punishment is based on repudiation [as principle] (*mabniyy 'alā al-dar'*) whereas manumission is based on enforcement and completion (*mabniyy 'alā al-īqa' wal-takmīl*), and yet some others say it should not take precedence because both imposition and removal of punishment as well as manumission and enslavement are equal before the divine law.

Nineteenth, when one of them is confirmed by general meaning (*yuwāfiquhā 'umūm*), while the other is not, then the former should be favoured, although according to some scholars that which does not entail specification (*allatī lā tūjib al-takhṣīṣ*) should be preferred; yet the first view is more correct because the general meaning is a proof in itself, so that if joined with logical inference, it will strengthen the latter.

Twentieth, when one of them is coupled with the statement of a Companion, then it should be favoured because the saying of a Companion is authoritative, according to some scholars, so that if joined with logical inference, it will strengthen the latter.

[69]

JURISTIC DISCRETION

Juristic discretion, as related from Abū Ḥanīfah—may Allāh have mercy on him—is a [legal] judgment based on what a *mujtahid* considers good, without any argument or proof (*al-ḥukm bi-mā yastaḥsinuhu min ghayr dalīl*). Some of his later disciples have disagreed over its meaning, however. According to some, it refers to specifying the legal reason through something that entails specification, whereas others define it as specifying some of the aggregate on the basis of a specifying proof. Still, for some scholars, it is to say something based on the strongest one of two proofs (*qawl bi-aqwā al-dalīlayn*), which could be any of the following: consensus (*ijmā'*), the sacred texts (*naṣṣ*), inductive inference (*qiyās*), or deductive inference (*istidlāl*).

As for the sacred text, it is like their saying that although inductive inference does not establish the option [to return a purchased item within three days of purchase] in trade because it is too risky, however it is deemed acceptable (*istaḥsannāhu*) due to a report [saying that it is allowed].[172] An example of the consensus is like their saying that although inductive inference does not permit entering a public bath except by paying a certain fee for making use of the place, nor [does it permit] sitting around in there except for a certain duration, nevertheless, it is deemed acceptable because of consensus. With regard to inductive inference, it is like their saying about someone who has sworn not to pray that by inductive inference, his oath is broken once he enters the state of prayer because by that time he will be called a praying person, and yet, we have considered him not breaking his oath until he performs most of one *rak'ah* (i.e. by completing the second *sajdah* of the first *rak'ah*)

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172 Referring to the *ḥadīth* from Ḥibbān ibn Munqidh al-Anṣārī who used to deceive his customers and told the Prophet—may Allāh honour him and grant him peace—about it, whereby the Prophet—may Allāh honour him and grant him peace—gave him a three-day period of *khiyār* (freedom to seal or cancel the transaction) and advised him, *"Sell [your goods] and say [to your customers], 'There's no trick!' (lā khilābah)"*, as narrated by al-Ḥākim in his *al-Mustadrak* (2:26) and corroborated by another ḥadīth in *Ṣaḥīḥ al-Bukhārī*, (2079).

because what is less than that is not counted and he will be viewed as not having begun the prayer yet. An example of deductive inference is their saying that by inductive inference, a person who says, 'If I do this or that, then, I am a Jew or a Christian', is not swearing since he does not swear in the name of Allāh the Almighty, and yet by some kind of deductive inference, we considered him forming a legal oath because anyone who dishonours an oath formed by these words is the same as he who dishonours an oath formulated by the words *wal-Lahi* (By God), which is also an inductive inference, even though they claim this to be a deductive inference, and they distinguish *qiyās* from *istidlāl*.

Now, if *istiḥsān* is a judgment based on whatever comes to one's mind and whatever one considers good without any proof, this is obviously absurd, because it would mean that it is a judgment based on caprice or whim and following personal desire or pleasure. But, legal judgments are derived from the proofs of Divine Law (*adillat al-shar'*), and not from what occurs to one's mind. On the other hand, if *istiḥsān* is what has been defined by his (i.e. Abū Ḥanīfah's) companions as specifying the legal reason, then we have already discussed it and we have shown its error. Still, if [as they suggest] it is specifying some part out of the whole on the basis of a specifying proof or argument, or [as others say] it is to assert a ruling based on the strongest one of two proofs, then this is something nobody denied. Therefore, the dispute on this issue falls away, and what remains is disagreement over the individual proofs or arguments which they claim to be specifying some part out of the whole and [which they claim to be] the strongest one of two proofs.

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THINGS PRIOR TO DIVINE LEGISLATION, RETAINING THE PREVIOUS STATE, OPTING FOR THE MOST EXTENUATING OPINION AND NECESSITATING EVIDENCE UPON THE REST

Our scholars disagree on [the status of] useful things prior to the issuance of divine law. According to some of them, ruling ought to be suspended or left undecided (*'alā al-waqf*), being neither prohibited nor permitted, which is the view of Abū 'Alī al-Ṭabarī[173] and that of the Ash'arites. Some of our scholars say that it is all permitted, which is the view of Abū al-'Abbās and Abū Isḥāq [al-Isfarā'īnī],[174] so that if anyone find anything he is allowed to have it and consume it, which is the opinion of the Mu'tazilites of Baṣrah. Others, however, say that it is all forbidden, so that one is not allowed to make use of anything nor to manipulate it, which is the view of Abū 'Alī ibn Abī Hurayrah as well as the opinion of the Mu'tazilites of Baghdad. [Of these three views] the first one is most correct, because if human reason were to make any judgment on the matters whether they are prohibited or permitted, then the divine law would not come up with something different, and since the divine law could issue permission at one time and prohibition at another time, it is clear that human reason could not have a definite saying on them, neither prohibition nor permission.

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173 He is al-Ḥasan ibn al-Qāsim al-Ṭabarī, who wrote the famous *Kitāb al-Iḍāḥ* and *Kitāb al-Muḥarrar*. Born in Ṭabaristān, he settled in Baghdād, where he taught until he died in 350H.

174 Al-Ustādh Abū Isḥāq is a Shāfi'ite scholar who lived in Iraq and Esfarayen, his hometown, before being invited by the people of Nishapur to settle there. He accepted the invitation and a magnificent school was built for him, the likes of which had never been seen in Nishapur. He remained there until his death in 418H, after which his corpse was transported to his hometown and buried there.

Section

There are two types of retaining the previous state *(istiṣḥāb al-ḥāl)*:[175] First, retaining the state of reason and, second, retaining the state of consensus. By retaining the state of reason, what is meant is the maintaining of the original state of no obligation (*barā'at al-dhimmah fi al-aṣl*), which is the [logical] method employed by jurists in the absence of religious proofs. And he does not move away from this (i.e. *istishab bara'at al-zimmah*) unless he is driven by a religious proof. But, whenever he finds one of the proofs from the divine law [supporting his movement], he must move away from it, regardless of whether the proof is explicit (*nuṭqan*) or implicit (*mafhūman*), of clear (*naṣṣan*) or obvious (*ẓāhir*) import. This is so because he maintains a legal status [of something as it is] in the absence of any religious proof, but whenever there is a proof emerging from the divine law, keeping with the status quo becomes forbidden.

Section

The second type is retaining the state of consensus. For example, a Shāfi'ite says about someone taking dry ablution (*al-mutayammim*) that if the person sees water while he is praying, he should go on praying, because there is consensus among scholars that since his prayer had already began before he saw water, this state [of finding no water] must be retained or continue after seeing water, unless and until there is argument moving him out of it. On this issue, our scholars have different views. Some of them, like Abū Bakr al-Ṣayrafī, say that it constitutes an argument, whereas others say that it is not. The latter view is the correct one however, because the argument here is the consensus, which took place before seeing water, so that once he saw water, the consensus became irrelevant. Therefore, it is not allowed to retain the ruling of the consensus on disputed issues without any proper legal reason that link both cases.

Section

With regard to opting for the least of all mentioned (*al-qawl bi-aqall mā qila*), it refers to a situation whereby scholarly views on a particular

[175] i.e. leaving things as they are, as they have been, and as they used to be: *thubūt amr fi al-zaman al-thāni li-thubūtihi fi al-awwal*.

case are divided into two or three opinions; some of them impose a certain amount, while other impose a lesser amount on the same case. For example, scholars disagree on the penalty for killing (*diyat*) a Jew and a Christian. According to some scholars, it must be the same amount due for killing a Muslim, while some other scholars say it must be half the amount due for killing a Muslim, and still others say only one third of the amount due for killing a Muslim must be imposed. The reasoning on this may be explained from two respects: First, it is based on retaining the state of no obligation, that is to say, the original state is exemption from any obligation unless indicated otherwise by the Divine Law. Since there is evidence showing that the killer [of a Jew or Christian] must pay one third of the blood money [of a Muslim], which is the agreement [of the scholars], and that the additional amount remains on account of exemption from duty, therefore, it cannot be made obligatory except with some proof or argument. This is a correct deductive inference, because it retains the state of reason concerning exemption from any obligation. Second, one saying this [agreed upon] view is certainly true (*hādhā al-qawl mutayaqqan*), while the opinion about the additional amount is doubtful, and therefore, it cannot be made obligatory on the basis of doubt. But, this legal analysis is not correct, because the additional amount cannot be made obligatory on the basis of doubt, anymore than it can be eliminated on the basis of doubt.

Section

He who denies a ruling is like the one who affirms it, as each must provide a proof or argument for it. Some of our scholars say that he who rejects does not have to bring any proof, while others maintain that on rational matters [he who rejects] must provide a proof, but on religious matters, there is no obligation [on those who reject a ruling] to give any proof. To support our view, we argue that a decisive negation can only be known except through a proof, just as a conclusive affirmation can only be known through a proof. And just as affirmation cannot be accepted without a proof, so is negation unacceptable except through some proof.

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THE ORDER OF EVIDENCES AND THEIR DERIVATION

You should know that whenever something happens in this world, he [i.e. the jurist] has to search in the sacred texts for the clear [statements in the Holy *Qur'ān* and *Ḥadīth*], as well as implicit ones, and [look into] the deeds and decisions of the Prophet—may Allāh honour him and grant him peace—as well as the consensus of scholars of the various cities. If he finds in there some guidance on the case, then he should make his judgment based on it. If, however, he cannot find [what he seeks], then he should search in the principles (*uṣūl*) and make logical inference based on them. In trying to find the legal reason (*'illah*), he should begin with the sacred text, so that if he finds the rational justification *(ta'līl)* expressed by the sacred text, he should take it. And if the *ta'līl* is not expressed in the Sacred text, he should examine all other legal matters that resemble the branch from all legal perspectives/qualities. If he cannot find it in the sacred text, he should take recourse to the implicit meanings (*al-mafhūm*); and if yet he found no clear *'illah* for the 'roots', he should look into the characteristics that impacts legalistically in those roots for the particular branch he is considering, and examine them one by one as well as collectively, so that any of them he finds acceptable—whether individually or collectively—he should base his ruling on it. If that is not possible, then he should find rational justification (*'allala*) based on similarities that may indicate a legal ruling, as we already explained earlier. If even this is unfound, he should find rational justification based on one with the closest resemblance (*al-ashbah*)—even if only a mere resemblance is observed; if no legal reason presents itself to him in the root, he knows that the ruling is confined to the 'root' [i.e. original case] and does not extend beyond it. Finally, in case he cannot find any guidance on the event from the divine law—neither explicitly nor implicitly, he should leave it as it is, on its original ruling based on reason, as we have explained earlier.

[72]

FOLLOWING THE AUTHORITY (*AL-TAQLĪD*): WHEN MUST THE AUTHORITY BE FOLLOWED AND FOR WHOM

Having explained the various methods a jurist may employ in order to discover the [Sharī'ah] ruling, we shall now discuss and elucidate that to which the laity (*al-'āmī*) take recourse in their practice of religion, namely, 'following the authority' *(taqlīd)*. In general, *taqlīd* is to accept an opinion or statement without any proof (*qabūl al-qawl min ghayr dalīl*). Judgments (*aḥkām*) are of two kinds: rational (*'aqlī*) and religious (*shar'ī*). The rational judgment should not be based on following authority. Thus, for example, knowledge about the Creator and His attributes, knowledge about the Prophet—may Allāh honour him and grant him peace—and other rational judgments [of similar nature should not be based on 'blind faith']. It is reported, however, that according to Abū 'Ubaydillāh ibn al-Ḥasan al-'Anbarī, it is alright to follow authority in holding the fundamentals of religion (*al-taqlīd fī uṣūl al-dīn*). But this is a mistake, because Allāh the Almighty mentions in the *Qur'ān* [concerning the unbelievers who say], *"We find our forefathers following a tradition and we are just following their footprints"* (*al-Zukhruf*, 43:23), whereby He condemns those people who simply follow their ancestors in matters of religion. This shows that such attitude is not allowed, because all these judgments are attainable through reason, and since all human beings have this [rational ability] in common, there is no way for 'blind faith' on these matters.

Section

The religious ruling is of two categories: [i] that which is known of the religion of the Prophet—may Allāh honour him and grant him peace—to be necessarily true, e.g. knowledge about the five daily prayers, the various *zakāt*, the fasting in Ramaḍān, the pilgrimage, the prohibition of extra-marital sexual intercourse and wine drinking, etc. In all these, 'blind faith' is not allowed, because all [Muslim] people have grasped and know it, so that following

authority blindly is meaningless. Another category is [ii] that which is not known except through reasoning and logical inference, e.g. knowledge about the details (*furū'*) of various rituals (*'ibādāt*) and transactions (*mu'āmalāt*), [pertaining to] sexuality and marriage, etc., the ruling of which may be known through following authority. According to Abū 'Alī al-Jubbā'ī, following authority is allowed on matters open for juristic discretion but not permitted on matters not subject to juristic discretion. Our position is supported by the Qur'ānic verse, *"Ask people of the Revealed Scripture if you do not know"* (*al-Naḥl*, 16:43), and [by the logical argument] that if we forbid following authority on those matters, then everyone would need to study them; but such obligation would entail interruption of livelihood and devastation of plants and crops, and therefore, must be dropped.

Section

With regard to those for whom following authority is allowed, they are the lay people, namely those who do not know the methods of [deriving] the Sharī'ah rulings. For them, it is permissible to follow a scholar and implement his verdicts. Some jurists, however, maintain that it is not permissible unless and until the lay person knows the legal reason behind a ruling. The argument in support of our view is thus: If we require the lay people to know the legal reason, then—as we have said just now—it would stop them from earning their livelihood, which will ruin their life in this world. Therefore, such requirement should not be imposed.

Section

The following consideration applies to the learned person: If he has ample time and capacity to exercise his own discretion (*yumkinuhu al-ijtihād*), then he must find the ruling through it. Some scholars however, maintain that he is allowed to follow an expert, which is the opinion of Imām Aḥmad, Isḥāq [ibn Rāhawayh], and Sufyān al-Thawrī. Yet, according to Muḥammad ibn al-Ḥasan [al-Shaybānī, one of Abū Ḥanīfah's companions], he is permitted only to follow someone else who has more knowledge, and not someone of the same level with him in religious knowledge. Still, some scholars say that he may follow someone else only if the case in question happens to him, but should not do so if the case happens to someone else.

The argument in support of our view is thus: Since he has the necessary tool to arrive at the desired ruling, he cannot be allowed to follow someone else, as we already noted concerning the rational judgments.

Section

If, however, his time is short and if exercising his own discretion could lead to missing a worship, then there are two views: [i] some scholars, like Abū Ishāq, say that following an authority in such a situation is not allowed, whereas [ii] others, like Abū al-'Abbās, say that it is permissible. The first view is correct because he does have the necessary tool to exercise his own discretion so that his situation resembles that of someone with ample time.

[73]

CHARACTERISTICS OF *MUFTĪ* AND *MUSTAFTĪ*

The one who delivers a formal legal opinion should be very proficient with the methods of [deriving Sharī'ah] rulings, namely: [i] [with regard to] the Holy Book, he must be acquainted with the rulings thereof, knowing what is lawful and what is unlawful, leaving aside the stories, wisdoms, exhortation, and reports; [ii] he must have a thorough knowledge of the traditions of the Prophet—may Allāh honour him and grant him peace—in explaining Sharī'ah rulings; [iii] he must know all the necessary methods of understanding the *Qur'ān* and *Sunnah* in terms of its various modes of discourse, origins and expressions of speech including the factual and the metaphorical or figurative, the universal and the particular, the general and the specific, the absolute and the conditional, the explicit and the implicit; [iv] he must have good knowledge of the [Arabic] language and its grammar that would allow him to grasp the intention of Allāh the Almighty and His Messenger—may Allāh honour him and grant him peace—in their speech [i.e. the Holy *Qur'ān* and *Ḥadīth*]; [v] he must be familiar with the deeds of the Prophet—may Allāh honour him and grant him peace—and their [legal] implications; [vi] he must have knowledge of the abrogating and abrogated rulings and the pertinent issues; [vii] he must be fully cognizant of the consensus of previous scholars as well as their disagreement, and able to discern which of those [consensus and disagreement] is counted and which is not; [viii] he must know how to make juristic inference and exercise discretion, how to identify the roots and characteristics that may and may not be used as legal reasons, and how to extract legal reasons; [ix] he must know the classification of proofs in terms of their priority and preponderance; just as [x] he must be a reliable and trustworthy person, who takes his religion seriously.

Section

Furthermore, he must give his expert opinion to those who ask for it; he must teach those who want to learn from him. If there is no one

else in the area [qualified to do so], then teaching and giving *fatwā* becomes his personal duty; but if there is someone else [qualified to do so], then teaching and giving *fatwā* is not his personal duty, as it becomes now a collective duty (*min furūḍ al-kifāyah*) which will be fulfilled if at least one of the population does it on behalf of the rest. In responding to queries, he must be clear. If the person involved in the case is present, and he is fully informed about it, then he may give his answer according to his knowledge of the situation; if however [the person involved] is not present, while the problem requires some details, then he should also give his answer in as detailed and plain a manner possible. If the person 'who asks question' (*al-mustaftī*) does not understand the language of the one 'who gives *fatwā*' (*al-muftī*), the latter should accept a reliable translator. Supposing the *muftī* has once exercised his discretion over a case, and has given his answer on it, and a similar case happens again, then on whether or not he must exercise his discretion anew, there are two opinions; some of our scholars say that he may give his answer based on the previous discretion, whereas according to other scholars, he must make a new *ijtihād*. But [for me] the first opinion is more correct.

Section

As regards the person 'who asks for a *fatwā*' (*al-mustaftī*), he is not allowed to consult just anybody as he pleases, lest he consult someone who has no knowledge of *fiqh*. Rather, he must get to know the *faqīh* whom he is consulting and be informed of the latter's authority and credibility, for which it would suffice him to rely on the testimony of one reliable person. Once he is informed that the person is a *faqīh*, he should consider: if the *faqīh* is the only one in town, then he may simply follow him; but if there is another *faqīh*, then there are two opinions as to whether or not he must exercise his discretion. Some of our scholars say he may follow anyone of them whom he wishes, whereas Abū al-'Abbās and al-Qaffāl say he must exercise his discretion with regard to the individual *muftīs* so that he may follow the most knowledgeable and the most pious among them. Nevertheless, the first view is more correct, because he is supposed to refer to the opinion of an authoritative scholar, which he has already done so that it should be sufficient.

Section

If someone consults two experts, then he should consider: if they both give the same answer, then he should adopt their view; yet if they disagree in such a way that one of them suggests prohibition while the other suggests permissibility, then scholars have three different views on this situation. According to some scholars, he may take the opinion of anyone whom he pleases, while others say he should exercise his discretion before accepting either opinion. Still, others say he should rather choose the answer that is harder to apply because truth is usually 'heavy'. Yet, the correct position on this is the first one, because as we explained earlier, he is not required to exercise his discretion, just as the truth is not necessarily found in the hardest answer. Indeed, the truth may be located in the easiest answer, because Allāh himself says [in the *Qur'ān*], *"Allāh desires for you ease, as He desires not hardship for you"* (*al-Baqarah*, 2:185), while the Prophet—may Allāh honour him and grant him peace—reportedly said, *"I am sent with a tolerant religion, and not with an innovated priesthood"*.

[74]

IJTIHĀD: THE VIEWS OF THE JURISTS AND WHETHER ALL OR ONLY ONE IS CORRECT

The term *ijtihād* is used by jurists to mean 'an exhaustive attempt and painstaking effort to find the Divine law or Sharī'ah ruling' (*istifrāgh al-wus' wa-badhl al-majhūd fī ṭalab al-ḥukm al-shar'ī*). Judgments (*aḥkām*) are of two kinds: [i] rational (*'aqlī*) and [ii] religious (*shar'ī*). The rational judgment is like: those about the origination of the world, the existence of the Creator, the affirmation of prophecy, etc. concerning the fundamentals of religion. On these issues, only one position [out of several or many views] can be right, while the rest must be wrong (*al-ḥaqq fī hādhihi al-masā'il wāhid, wa-mā 'adāhu bāṭil*). It is reported, however, that according to Abū 'Ubaydillāh ibn al-Ḥasan al-'Anbarī every *mujtahid* [i.e. everyone who exercises discretion or *ijtihād*] is right. Some scholars say that his statement applies to fundamental issues on which there is disagreement among those affiliated to Islam (*ahl al-qiblah*), whereby each group is referring to the [Qur'ānic] verses and [Prophetic] tradition that are open to different interpretation (*āyāt wa-āthār muḥtamalah lil-ta'wīl*), such as those about seeing God [in the Hereafter], about the creation of [human] acts, about the anthropomorphic description of God, etc., rather than to the fundamental religious issues on which Muslims differ from followers of other religions. But what he says is wrong, because all those opinions that are different from or contradict the truth—such as anthropomorphic statements and denial of God's attributes—cannot spring from the Divine Law, so that anyone who holds a different or contradicting view—such as believing in Trinity and renouncing the Prophets—cannot be right.

Section

The religious judgments are of two types: [a] that which is open to discretion, and [b] that which is not subject to discretion. The latter is of two kinds: [i] matters of Prophet's religion that are known necessarily (*mā 'ulima min dīn al-rasūl ṣallā Allāh 'alayhi wa-sallam ḍarūratan*), e.g. [knowledge about] the obligatory prayers and

mandatory *zakāt*, the prohibition of adultery, sodomy, wine drinking, etc. Whoever opposes or disagrees with anyone of these rules knowingly is an infidel (*kāfir*), because all this is part of Divine religion that is known necessarily, so that whoever disagrees on it, has given the lie to Allāh the Almighty and His Messenger—may Allāh honour him and grant him peace—and rejected their statements, and is, therefore, considered *kāfir*. [ii] Matters of the Prophet's religion that are not known necessarily, e.g. [knowledge about] the rulings that are established by the consensus of the Companions and jurists of various cities, though not part of the Prophet's religion that are known necessarily. On these matters too, only one position can be right (*al-ḥaqq min dhālika fi wāḥid*), namely that which is agreed upon by scholars, so that whoever opposes or disagrees with anything of it is a transgressor (*fāsiq*).

Now, that which is subject to discretion (*mā yasūghu fihi al-ijtihād*) are issues disputed by jurists of various cities, whereby they have two opinions or more. Our scholars have different views on this. Some of them say that only one position can be right and the rest are wrong but not sinful. According to them, this is what al-Shāfi'ī—may Allāh have mercy on him—said and that he has no other view on this issue. But some of our scholars say that he did have two views on this issue, of which one is what we have just mentioned while the other view is that every jurist who uses his discretion is right (*kull mujtahid muṣīb*), which is the view obviously held by Mālik—may Allāh have mercy on him- as well as by Abū Ḥanīfah—may Allāh have mercy on him; and this is also the opinion of the Mu'tazilites and Abū al-Ḥasan al-Ash'arī. There is a report from Abū Bakr al-Ash'arī [who got it] from Abī 'Alī ibn Abī Hurayrah who belong to our scholars saying that he maintained that only one of these various positions can be definitely true according to Allāh the Almighty, and that those who are wrong have committed a sin, and that differing or opposite judgment if issued by a judge must be revoked, which is the opinion of al-Aṣamm and Bishr al-Marīsī and Ibn 'Ulayyah.

Those among our scholars who say that only one position can be right have differing opinions on whether or not everyone is right in exercising his discretion. Some of them say that those who make a wrong judgment is wrong in his discretion, whereas some others maintain that everyone is right in his discretion even though they may make a wrong judgment—a view reportedly held by Abū al-'Abbās. Still, those who say every *mujtahid* is right are of differing opinions. Some colleagues of Abū Ḥanīfah—may Allāh have mercy

on him—say that it is the one closest to the truth that is known only by Allah, the *mujtahid* may sometimes attain it and sometimes miss it, but some of them deny this. And those who advocate verisimilitude in turn disagree over its meaning. Some of them refuse to go beyond interpreting it as what is more well-known, whereas others reportedly say that what is closer to truth according to Allāh in judging a certain case is the strength of verisimilitude due to the strength of the indicator, which is a clear pronouncement that the truth lies in one [of the positions only] so that it must be searched for (*al-ḥaqq fi wāḥid yajibu ṭalabuhu*). Another opinion says that what is closer to the truth that is known to Allah is that the judgment on this or that case is such that if He were to declare it in the sacred text clearly, it would be none other than this particular ruling.

However, of all the views put forth by our scholars the first one is correct, i.e. only one position is right, while the rest are wrong but not sinful (*al-ḥaqq fi wāḥid wa-mā siwāhu bāṭil wa-anna al-ithm marfū' 'an al-mukhṭi'*). Supporting our view is what the Prophet—may Allāh honour him and grant him peace—said, *"When a judge exercises his discretion and makes the right decision, he gets a double reward; and even if he makes a wrong judgment, he still gets a reward"*.[176] Moreover, if all were true and right, it would make no sense to reason and do research (*law kāna al-jamī' ḥaqqan wa-ṣawāban, lam yakun lil-nazar wal-baḥth ma'nan*). Our argument for alleviating the charge of sin from those who make a wrong judgment is based on this ḥadīth but also on the fact that the Companions—may Allāh be pleased with them—have unanimously allowed judgment according to one of the disputed views whilst also affirming the views of those who disagree with them, which shows that none of them is sinful [for holding a different opinion].

Section

It is impossible for [more than one or many] arguments concerning a case to be of equal worth [in such a way that one affirms what the other negates], but rather it must be possible to tip the balance in favour of one against the other [or the rest]. According to Abū 'Alī and Abū Hāshim [al-Jubbā'ī], it is possible, however, for two

[176] The *ḥadīth* is reported in the *Ṣaḥīḥ al-Bukhārī*, Kitāb al-I'tiṣām Bāb Ajr al-Ḥākim (7352) and in the *Ṣaḥīḥ Muslim*, Kitāb al-Aqdiyah, Bāb Ajr al-Ḥākim, (1716).

arguments to be equally valid, so that a *mujtahid* may choose and implement any one of them as he pleases. Yet, [the correct view is] what we have just stated because truth lies in one of them only, and therefore, it is impossible for various arguments to have equal validity such as rational matters.

[75]

A JURIST ISSUING TWO VERDICTS FOR A SINGLE MATER

A jurist exercising his discretion may issue two opinions on a legal question by saying, for instance, that this particular problem brings about two views in the sense that all opinions other than these two are wrong. Some people, to whose opinions no consideration should be given, however, say that it is not allowed. But, this opinion is wrong; for [i] if, by disallowing a jurist to issue two opinions, they mean preventing him from holding two views together such as to say that this is both permissible *and* prohibited 'concurrently' (*'alā sabīl al-jam'*), then, we do not allow this either; but [ii] if [on the other hand, by disallowing a jurist from issuing two opinions], they mean preventing him from holding two views on the same issue such as saying that it is either permissible *or* prohibited 'optionally' (*'alā sabīl al-takhyīr*), so that he may choose one of them as he pleases, then, this is also not permitted; but [iii] if [they mean by it] letting him say that a particular problem brings about two opinions in order to eliminate all other opinions, then, this is permitted. This is so because a jurist may have so strong an argument that demolishes all opinions except two and yet there seems to be no good reason for him to favour one over the other at the moment, and therefore, he issues two opinions in order to show that all other opinions are wrong. This is like what Caliph 'Umar—may Allāh be pleased with him—did during consultation [to appoint his successor], as he said, "The caliph after me should be one of the six", in order to show that the leadership should not be given to anyone else other than one of those six men.

With regard to al-Shāfi'ī—may Allāh have mercy on him—his issuing of two opinions on a particular problem, is of several categories: [i] he gave two answers at two different times, whereby in the early period he made a judgment, but then, in the later period he revoked it; and this is definitely permissible, since 'Alī—may Allāh honour his face—once said, "My opinion as well as the opinion of the Commander of the Faithful [i.e. Caliph 'Umar ibn al-Khaṭṭāb] concerning the slave women who had child even from their masters was that they should not be sold, but now my opinion is that they may

be sold". There are also reports from Abū Ḥanīfah and Mālik—may Allāh have mercy on them—withdrawing what they have said earlier; [ii] he [i.e. al-Shāfi'ī] gave two answers on a particular question at the same time, though he also pointed out which of them is the correct one by saying that one of them is weak (*madkhūl*), easy to break (*munkasir*), etc. thereby indicating what is right and what is wrong. This is also permissible as the various ways of exercising discretion show that the question may have two answers, but since one of them implies such-and-such he discards it, which is also instructive about the methods of *ijtihād*. Abū Ḥanīfah—may Allāh have mercy on him—for example, said, "Juristic inference implies such-and-such, but I have abandoned it due to some report"; [iii] he [i.e. al-Shāfi'ī] explicitly gave two answers in two places on two different occasions so that the two are not different answers for the same problem but rather [they are two different answers] for two different problems, which is like two statements of the Prophet—may Allāh honour him and grant him peace—in two places about two different issues; [iv] he [i.e. al-Shāfi'ī] explicitly gave two answers without pointing out which of them is correct and died [without clarifying which is correct]; it is said that what belong to this category are [answers] pertaining to seventeen questions only; and this is also permissible because he may have had good reasons to discard all opinions other than the two, which he did not live to further investigate and elucidate, such as reported about Caliph 'Umar—may Allāh be pleased with him—during consultation [to appoint his successor] and like what Abū Ḥanīfah reportedly said when he was in doubt concerning the water leftover by donkey after drinking (i.e. whether one can use it for ritual purification or not).

Section

When a jurist gives an opinion and thereafter expresses another opinion, then the second one should be taken as invalidating the first one. Some of our scholars however say that it does not [cancel the first opinion], but rather offers two answers for one and the same problem, which is not correct because the second opinion is contradicting (*yunāqiḍu*) the first one so that the first one is revoked, just like two statement of the sacred text concerning the same case.

Section

However, if a jurist expresses two opinions and, after re-examining the problem, reaffirms only one of his two opinions, it should be taken as choosing the one which he reaffirmed. Some of our scholars however say that it does not indicate his choice. But, what we just said is correct because the second opinion runs contrary (*yuḍāddu*) to the first opinion so that it becomes as if he expresses one of the two opinions in the beginning and expresses the other opinion later.

Section

If a jurist gives his opinion concerning some case and thereafter says, "If somebody says such-and-such, it would be a valid way to go (*law qāla qā'il kadhā wa kadhā, kāna madhhaban*)", it is impermissible to say that this was a legal verdict of his. Some of our scholars, however, say that it can be said that in his opinion, which is not correct because it simply means that the case may have another, alternative explanation but it cannot be said that it was his *madhhab*.

Section

What is entailed by the logical inference of a jurist cannot be taken as his opinion. Some of our scholars, however, say it can [be regarded as his opinion], which is incorrect because his opinion is what he has explicitly stated (*mā naṣṣa 'alayhi*), whereas what he has not expressed cannot be ascribed to him.

Section

If a jurist has expressed his opinion about some case and has stated a contrary opinion about a similar case, it is not allowed to transfer his opinion on one of the questions to the other. Some of our scholars, however, say that it is permissible to transfer the answer concerning one of the two questions onto the other as well as to explain it with two opinions, which is not a correct view, because [i] he clearly stated one opinion only, and so, it is not allowed to ascribe to him what he never explicitly stated, and [ii] he obviously meant to treat the two questions differently so that those who put them together has actually gone against him.

[76]

IJTIHĀD BY THE PROPHET (S.A.W.) AND IN HIS PRESENCE

It is permissible to exercise discretion in the presence of the Prophet—may Allāh honour him and grant him peace—although some of our scholars deny its permissibility. Our argument is that the Prophet—may Allāh honour him and grant him peace—told Sa'd [ibn Mu'ādh al-Awsī] to make his decision on Banū Qurayẓah [i.e. one of the Jewish tribes of Madīnah]. So he [Sa'd] exercised his discretion in the Prophet's presence. For what is allowed to be the basis of judgement in the Prophet's absence must also be allowed in his presence, just like the sacred text.

Section

It was permissible for the Prophet—may Allāh honour him and grant him peace—to make a ruling on cases by using his own discretion, although some of our scholars deny it. For us, [it was permissible for him to do so because] if learned men other than him were allowed to rule or judge by using their own discretion, then it should be *a fortiori* permissible for the Prophet to do so, since his discretion is far more complete (*huwa akmal ijtihādan*).

Section

It was also possible for the Prophet—may Allāh honour him and grant him peace—to make a mistake [in judgment], although the mistake did not remain long [as it was soon corrected]. Some of our scholars, however, maintain that the Prophet—may Allāh honour him and grant him peace—could not make any mistakes, which is of course not correct, because Allāh the Almighty says in the Holy *Qur'ān*, *"Allāh has forgiven you for granting them leave"* (*al-Tawbah*, 9:43). This shows that it was possible for him to make a mistake, because whoever may neglect and forget can possibly make a mistake just like everyone else.

Section

Finally, it is possible that Allāh the Almighty commanded His Prophet—may Allāh honour him and grant him peace—to make a law by saying, for example, *"Make compulsory and make customary what you consider beneficial for mankind"*. Most of the Qadarites [i.e. Mu'tazilites], however, deny its possibility, which is not correct, because that possibility neither implies impossibility nor entails invalidity [of the legislation], and therefore, it is possible. Allāh knows best.

End of the Book

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